No. 16184

United States Court of Appeals

for the Ninth Circuit

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—10-31-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Court of Appeals
for the Ninth Circuit

No. 15,301

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPINION

Before: Denman, Senior Circuit Judge; Pope and Barnes, Circuit Judges.

Barnes, Circuit Judge:

After waiving a jury trial, appellant Arthur King Wilson was tried and convicted by the District Court of six counts of wilfully attempting to defeat and evade the payment of federal income taxes and Federal Insurance Contribution Act (commonly known as "Social Security") taxes withheld from the wages of employees of Coast Redwood Company, Inc., a family corporation of which appellant was President, in violation of Section 2707(c) of the Internal Revenue Code of 1939,[1] as made applicable by Sections 1430 and 1627 of said Code. The periods involved in the six counts were the second, third, and fourth quarters of 1952, which encompassed the period from April 1, 1952, to December 31, 1952, inclusive. Counts One, Two, and

[1]26 U.S.C. § 2707(c).

Three related to income taxes allegedly withheld and not paid over in the respective amounts of $49,913.33, $15,605.48,[2] and $41,149.38. Counts Four, Five, and Six dealt with F.I.C.A. taxes allegedly withheld and not paid over in the respective sums of $5,559.95, $3,807.79, and $2,043.69.

The indictment charged in each and every count that appellant had committed the felonious offense

> "* * * by failing and refusing to pay said * * * taxes withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendant and members of his family, and by causing said corporation to pay creditors other than the United States * * *"[3]

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[2]The total sum withheld for federal income taxes in the third quarter of 1952 was $44,524.53. However, a partial payment was made in this quarter in the amount of $28,919.05, leaving a balance due and unpaid of $15,605.48.

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[3]The Government was not required to allege the particular manner by which the offense was committed. United States v. Simmons, 96 U.S. 360. The allegations are here set forth to crystallize the Government's position, not to state an essential element of the offense.

Appellant raises two questions on this appeal. The first and principal question may be characterized broadly as concerning the sufficiency of the evidence to support the denial of a motion for judgment of acquittal made at the close of the Government's case-in-chief and renewed after all the evidence was in. Actually appellant's argument on this point has two facets. He complains that the District Court applied an erroneous standard with respect to the subjective state of mind requisite to culpability under Section 2707(c), and further, that under the proper criterion the evidence is not sufficient to support the denial of his motions and the judgment of conviction. The other question tendered herein pertains to alleged error in the exclusion of evidence.

This is a unique criminal case. There does not appear to be a single reported decision involving a felony prosecution for failure to pay withholding taxes. The instant case is not distinguished for that reason alone. It is unusual as well in that the acts alleged to constitute the necessary overt and objective element of the violation of Section 2707(c) do not conform to the tapestry and pattern of deception, concealment, and artifice ordinarily found in criminal tax evasion cases.

The evidence, largely uncontroverted, discloses that appellant organized and incorporated Coast Redwood Co., Inc., in the State of California in May of 1945. It engaged in the logging and sawmill business with operations centered in the redwood

and fir forests of Northern California. The stock in the corporation was wholly owned by appellant and members of his family and he served actively as President from the date of incorporation. Coast Redwood Co. was one of several interrelated corporations owned entirely or substantially by appellant and members of his family and actively operated by appellant as President. Most of its business transactions and dealings were with these affiliated corporations. It functioned as a middle link in a vast chain of lumber enterprises whose activities extended from the acquisition of timber tracts to the sale of finished lumber. Two of these affiliated corporations, Union Bond and Trust Company and Ah Pah Redwood Company,[4] owned or were purchasing the timber tracts upon which Coast Redwood Co. conducted its logging and cutting operations. Still another family corporation, A. K. Wilson Lumber Company, purchased rough lumber from Coast Redwood and remanufactured it into finished lumber for sale in the trade. In 1952 Coast Redwood sold all of its redwood log cants to A. K. Wilson Lumber Co.

Coast Redwood had originally been capitalized for $5,000.00. It enjoyed success and prospered in the years preceding the indictment period and for that reason and perhaps also due in part to monies

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[4]The Ah Pah Redwood Company was a wholly owned subsidiary of International Pulp & Paper Company. Appellant and his family owned all of the common stock and 20% of the preferred stock in the latter corporation.

derived from an abortive sale of certain assets of the corporation,[5] Coast Redwood Company's capital at the end of the fiscal year on April 30, 1952, included earned surplus of $306,433.04. This despite the fact that the corporation had encountered financial difficulties during that fiscal year and had incurred a net loss therein of $274,323.95. Adversity continued to plague the corporation during the fiscal year ending April 30, 1953 (which included almost the entire period covered by the indictment), and it sustained a net loss of $224,099.32. Part of this loss (the exact extent is vigorously disputed) was attributable to a summer fire which destroyed cut timber and hampered operations. As a result of its intensified financial plight, Coast Redwood Co. initiated proceedings under Chapter Eleven of the Bankruptcy Act on January 30, 1953. It was adjudicated a bankrupt on November 9, 1954.

A study of the past tax record of Coast Redwood Co. fails to reveal a portrait of a dutiful and diligent taxpayer. It had been delinquent in respect to

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[5]Early in 1951, appellant sold the sawmill and other assets of Coast Redwood Co. to a Mr. Hull, who paid appellant $925,000 in cash prior to taking possession of the sawmill in April, 1951. Mr. Hull was unable to make the installment payments required by the agreement of sale and appellant resumed control of these assets in December, 1951. When questioned as to the disposition of the money received from Mr. Hull, appellant stated that it was used "to pay bills and get the property in shape where we could deliver it to Mr. Hull when the time came." [Tr. 668.]

meeting its obligation to pay over withheld income and Social Security taxes to the Government as long ago as 1947 and 1948. Again, at the start of the indictment period (namely, April 1, 1952), Coast Redwood Co. was delinquent in the payment of prior withholding taxes. Pursuant to an understanding reached with the Internal Revenue Service, it was paying off these past obligations at the rate of $1,000 per week. The sums paid during the indictment period were credited seriatim to the oldest outstanding obligation, in accordance with existing Internal Revenue Service policy where no instructions to the contrary are given. Neither Coast Redwood Co. nor appellant requested or instructed that the sums be applied in any different manner. Accordingly, the monies paid over to the Government during the indictment period, with the exception of the partial third quarter payment, served only to diminish prior obligations and not to pay current liabilities. However, it should be observed that payments made during each quarter of the indictment period and applied to accrued obligations did not in any instance equal or exceed the amount of money withheld and not paid over during that particular quarter.[6]

Appellant has resolutely maintained from the inception of the investigation into Coast Redwood

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[6]An aggregate amount of $87,973.00 was paid over to the Collector of Internal Revenue during the indictment period, of which the sum of $28,919.05 was applied, as noted previously, to the third quarter liability and the balance of which was credited to back taxes which accrued prior to the commencement of the indictment period.

Company's tax situation that the failure to pay the tax obligations on time was ascribable to the lack of sufficient funds. It was not that Coast Redwood Co. never had adequate funds to meet its tax obligations. The corporation's books and accounts completely refute such a contention. Coast Redwood Co. kept two bank accounts which during each month of the indictment period reached substantial credit amounts, although, it must be added, the general over-all state of these accounts was one of constant overdraft.[7] It was rather, appellant claims, that Coast Redwood Company's financial resources were so severely drained by the business setbacks it was experiencing in 1952, and it was so beset by other pressing obligations and impatient creditors that it was not possible to pay the Government in full if the corporation was to survive. Consequently, as appellant depicts the scene, Coast Redwood Co. was confronted with a continuing perplexing problem arising from the described predicament—who shall be paid and how much?

Appellant was chief executive officer of the corporation. It was his responsibility to determine how

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[7]Coast Redwood Company's bank accounts can most accurately be characterized as active and fluctuating. The following example vividly illustrates the dynamic state of the corporation's bank accounts. Its commercial account at the Arcadia Branch of the Bank of America showed a balance of $921.44 on August 8, 1952. The next day the balance was $18,816.85. And on August 11, 1952, the account showed that $20.76 was overdrawn.

corporate funds should be expended. He was not himself the "disbursing officer" for the corporation, but he had the final word as to what bills should or should not be paid, and when. Possessed of such authority and power, he came within the purview of Section 2707(d) of the I.R.C. of 1939, which defines a "person" subject to the preceding subsections of § 2707.[8] Appellant asserts that his choice was highly circumscribed. He says he could have paid the Government in full and neglected most of the other creditors entirely. Had he done this, appellant submits, Coast Redwood Co. would have been forced to shut down. He could have apportioned payments of available funds to various creditors, including the Government, and continued in business. Appellant states that he wanted to remain in business, expected and hoped to extricate Coast Redwood Co. from its embarrassed financial status, and planned to pay off all creditors in full. Of course, attainment of his related objectives lay with

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[8]Section 2707(d) provides as follows:

> "The term 'person' as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Appellant does not contest on this appeal the sufficiency of the evidence to support a finding that this provision applies to him. Cf. Levy v. United States, 140 F. Supp. 834; Cushman v. Wood, 56-2 USTC 9690 (1956); Wade v. United States, 54-2 USTC 49,066 (1954).

the latter alternative, which appellant therefore chose to pursue.

In order to stay in business, Coast Redwood Co., according to appellant, had to pay its current trade obligations such as payroll, suppliers, log haulers, insurance, and other similar operating expenses. Otherwise the necessary services rendered by this group of creditors would not have been forthcoming. Accordingly, appellant ordered that these obligations be accorded top priority. An Internal Revenue Service agent quoted appellant as later saying that he was, in effect, robbing Peter to pay Paul and the United States was Peter in this instance. The agent testified that appellant also admitted that the Government rated a low priority. Appellant does not deny that the Government was not given first preference but urges in justification of his policy that he was at all times trying to do what he thought most likely to assure preservation of the corporation and eventual payment in full to all creditors, including the United States.

Wilson did not seek to conceal his policy or Coast Redwood Company's actual tax liability from the Government. Throughout the indictment period Coast Redwood Co., under appellant's stewardship, filed full, accurate and timely tax returns reflecting the amount of money owed. Appellant acknowledged, and never disclaimed, Coast Redwood Company's tax liabilities. He simply refused to direct their payment.

The operations of Coast Redwood Co. were considerable in scope and volume. During the indictment period its gross receipts totaled $2,412,635.00 and its total disbursements amounted to $2,414,-263.00. As heretofore noted, Coast Redwood Company's business activities were conducted principally with affiliated corporations. Many of the expenditures and receipts during the nine-month period covered by the indictment involved these affiliates. The inter-corporate dealings and transfers of funds from one entity to another were numerous and complicated. Counsel for both sides devoted much attention and placed much emphasis upon whether these dealings and transfers constituted an affirmative attempt to siphon off available funds to affiliates, and were designed by appellant to evade and defeat the payment of the tax obligations. No useful purpose would be served by encumbering this opinion with compilations of these myriad transactions in light of our disposition of this appeal and the grounds therefor. It suffices to say that the original set of figures shows a net inflow to Coast Redwood from these dealings; the adjusted journal entries indicate a net outflow resulted from these transactions. A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwod Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five per cent discount for non-existent brokerage fees on log cants sold to it, it is

also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners.

Appellant supports various payments made to affiliates in preference to clearing up the tax obligations on the ground that these payments and in some instances, loans, were necessary to keep the other corporations solvent, and that in view of the interrelationship between his various corporations it was essential to Coast Redwood Company's continued existence that the affiliates remain in business. It should be noted here that the evidence fails to reveal any diversion of funds from the corporation directly to appellant or his family. Appellant drew no salary during the indictment period and the corporation never declared or paid a dividend in its ill-fated lifetime.[9]

It should be noted also that appellant's version of Coast Redwood Company's dire financial condition and consequent dilemma, especially the assertion that preservation of the business rested on non-

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[9]Two Coast Redwood Co. checks were drawn to the order of appellant during the indictment period. The first was a $1,000 check drawn in October, 1952, by an employee acting apparently without appellant's knowledge and consent. It was restored to Coast Redwood Co. the next month. The second was a $19,000 check issued on November 28, 1952. The sum represented by this check wove a tortuous path through appellant's many corporate entities, but did not come to rest in his account. The sum was transferred to the account of A. K. Wilson Lumber Co., which treated the transaction as a Transfer of

payment of the tax liabilities, was challenged by the Government and apparently disbelieved by the court below. The District Court was seemingly of the opinion that appellant's explanatory statements, self-serving in character, were not persuasive because the tax obligations represented a mere pittance in the over-all financial dealings of the corporation. Of course, the trier of fact was free to discount appellant's testimony and no error was committed thereby. Appellant's defense has been here considered at length, not to permit an appellate tribunal to "second guess" a trial court on a factual issue, but to highlight the especial significance of the constituent mental element of the offense under the circumstances of the instant case.

Another facet of the instant fact situation deserves mention. Appellant and representatives of the Internal Revenue Service conferred from time to time during the indictment period regarding the matter of Coast Redwood Company's tax delinquencies. Invariably these conferences culminated in a

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funds from Coast Redwood Co. to Union Bond, and from Union Bond to A. K. Wilson Lumber Co.

The Government also sought to establish that appellant was depleting the funds of A. K. Wilson Lumber Co. and thus indirectly siphoning Coast Redwood Co. funds. The basic premise of the Government's charge is that funds were transferred from Coast Redwood Co. to A. K. Wilson Lumber Co. or A. K. Wilson Lumber Co. refused to pay its obligations to Coast Redwood Co. for tax evasion motives. Consequently, the textual discussion covers this point.

promise by appellant that the corporation would, among other things, make regular installment payments of a certain sum or would settle its tax liabilities by a certain date. Just as invariably, for one reason or another, Coast Redwood Co. never fulfilled its undertakings. Nevertheless, the Internal Revenue Service acquiesced repeatedly in the delays and refrained from seizing the corporation's property in the hope that the business could be preserved; the same hope appellant urges was motivating him. Unfortunately, appellant's expectation proved groundless and his hopes were dashed. Coast Redwood Co. collapsed and was ultimately adjudicated a bankrupt. Had events taken a different turn, this case might not be before us.

We turn now to a consideration of the statute. Section 2707(c) provides as follows:

> "Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony * * * (penalties omitted) * * *"

Since appellant both collected and accounted for the withheld monies, conviction under this section can be predicated only on the wilful attempt to evade or defeat the payment of the taxes.

The conduct rendered felonious by § 2707(c)—the wilful attempt to evade or defeat the payment of taxes—contains two constituent elements. They are a particular subjective state of mind—"wilful"—and certain objective activity carried on pursuant to such mental state—"attempt to evade or defeat the payment of the taxes." They must co-exist to constitute an offense. In other words, the defendant must have wilfully engaged in the attempted evasion.

The District Court took the position during the course of the trial that the knowing and intentional disbursement to others of funds withheld from employees for payment of income and Social Security taxes constituted an offense under § 2707(c). Under this view the Government was required to prove only that appellant was cognizant of the tax obligations, that corporate funds were physically available for their payment, and that appellant intentionally chose to divert these funds to other uses. The motivation and purpose which governed the distribution of funds were deemed immaterial. Appellant asserts that this approach misconceives the requisite mental element of the crime and that it was incumbent upon the prosecution to prove that an evil motive or bad purpose controlled appellant's direction of the disbursement of Coast Redwood Company's funds.

To fully comprehend the nature of the conduct condemned by § 2707(c), it is necessary to examine the section in the statutory framework in which it

appears. § 2707(c) is the apex of a series of penalties for assorted violations of the internal revenue laws. § 2707(a) prescribed a 100% civil penalty for wilful failure to pay, collect, or truthfully account for and pay over certain taxes and for wilful attempt to evade or defeat the tax or its payment. And § 2707(b) makes it a misdemeanor to wilfully fail to pay a tax covered by this subsection, make returns required by law, keep such records as are required by law, or to supply such information as is required by law. Subsections (a), (b), and (c) all required that the person act wilfully in failing to perform his statutory duty.

However, the term "wilful" is not defined in the statute. Nor does the legislative history afford illumination on this point. We move thence to the decisional law on the definition of this term. The word "wilful" is susceptible of many meanings. Its interpretation is frequently influenced by its context. It may mean one thing in civil cases and quite another thing in criminal prosecutions. When used in criminal revenue statutes, it has generally been construed to mean an act done with evil motive, bad purpose, or corrupt design. United States v. Murdock, 290 U.S. 389; Spies v. United States, 317 U.S. 492. The Spies case, a landmark decision in this area of law, involved a felony conviction for attempted income tax evasion under Section 145(b) of the I.R.C. of 1939. The Supreme Court, in reaffirming the traditional notion of the mental element required for criminal conviction for non-payment of taxes, declared:

> "The difference between wilful failure to pay a tax when due, which is made a misdemeanor, and wilful attempts to defeat and evade one, which is made a felony, is not easy to detect or define. * * * It (wilful) may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of wilfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no wilful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect wilfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." 317 U.S. at 497-8. [Emphasis added.]

The Supreme Court's precise holding in the Spies case was that the District Court erred in refusing to give a requested instruction that if the jury found only that defendant had wilfully failed to make a tax return and wilfully failed to pay the tax due, then it could not find the defendant guilty of a wilful attempt to defeat and evade the income tax. Section 145,[10] dealing with income taxes, is

[10]26 U.S.C., § 145.

analogous, and phrased similarly, to section 2707. Both statutes draw a distinction between the wilful failure to pay a tax, which in each instance constitutes a misdemeanor, and the wilful attempt to evade or defeat the payment of a tax, which in each instance, is a felony, a distinction which, the Supreme Court readily conceded "is not easy to detect or define." 317 U.S. at 497. The Court held that the difference between the two kinds of prohibited conduct is that the word "attempt," as used in the felony section, denotes an affirmative act of evasion rather than a wilful omission designed to evade the tax. The mere wilful failure to pay, without more, could constitute no more than the misdemeanor.

The Supreme Court noted that Congress had used the comprehensive phrase "in any manner" in stating the modes by which a wilful attempt to evade and defeat a tax might be achieved. It then listed "by way of illustration, and not by way of limitation" some of the more common methods of attempted evasion, "such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct, the Supreme Court stated, "The offense may be made out even though

the conduct may also serve other purposes such as concealment of other crime." 317 U.S. at 499.

The unusual facts of the case at bar do not reveal the common examples of badges of fraud set forth by the Supreme Court. Of course, the phrase "in any manner" covers novel and unusual as well as common methods of evasion, for it is all-inclusive. United States v. Gordon, 3 Cir., 242 F. 2d 122; Rothwacks, Law and Procedure in Criminal Tax Prosecutions, 26 Taxes 797 (1948). Consequently, the diversion of available funds to affiliates and other creditors in preference to payment of Government obligations qualifies as an affirmative act under the statute and would warrant conviction if done with the requisite state of mind.

It would appear that the well-settled rule of statutory construction that statutes dealing with the same general subject matter are to be construed in pari materia is applicable, and that the Spies decision is determinative of the content of the subjective element required by section 2707(c).[11] There appears to be but a single salient difference between sections 145(b) and 2707(c). It is that the former deals with the defendant's taxes, while the latter involves taxes owed by others and withheld for payment to the Government. These latter tax funds constitute "a special fund" held "in trust" by the employer. Section 3661, I.R.C. of 1939. The District Court

[11]See Hawkinson v. Comm. of Internal Revenue, 2 Cir., 235 F. 2d 747.

felt that the deliberate disbursement of monies held in a fiduciary capacity "which didn't belong to the defendant" is sufficient, in itself, to support a conviction under § 2707(c). Thus, it would be enough if proof was adduced that the defendant intentionally and knowingly acted in a manner which resulted in non-payment of the taxes and it is not essential that the acts were in fact done for the purpose of evading or defeating the payment of the taxes.

Is this distinction between ordinary taxes and so-called "special fund" taxes justified?

We cannot find support for such distinction in either the statute or the adjudicated cases arising thereunder. It is true that a difference exists in respect to the capacity in which the tax monies are held. But the duty to pay is the same in both instances, as is the effect of non-compliance. It may well be that the capacity in which the monies are held exposes the defendant to the risk of additional penalties for non-payment of taxes,[12] but there is

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[12]One such additional obligation for the breach of which there is a concomitant penalty is the duty to account and pay over the monies, as provided in Section 2707(c). The conclusion that the capacity in which the funds are held does not alter the content of the subjective element of a felonious attempt to evade or defeat the payment of a tax is buttressed by the provisions of Section 3661 of the Internal Revenue Code of 1939. It provides that:

> "Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay such tax over to the

nothing in any revenue statute which would alter the subjective element of felonious tax evasion because of the capacity in which the funds are held. It would require a clear manifestation of Congressional intent that the Internal Revenue Code should be construed to set up one rule for "special fund" taxes, and another rule for income taxes, before we could so hold. We cannot find the semblance of such Congressional intent.

The conclusion that the capacity in which the funds are held does not provide a basis for modifying the traditional subjective element of tax evasion is borne out by the cases decided under other subsections of 2707. In Yarborough v. United States, 4 Cir., 230 F. 2d 56, the Fourth Circuit affirmed a misdemeanor conviction under 2707(a) for wilful failure to file income and Social Security taxes withheld from the wages of employees. The jury was instructed in that case that wilful means bad purpose, evil motive, or lack of justifiable excuse. The civil cases arising under § 2707(a) also recognize

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United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

Thus, the second sentence, in terms, refutes the notion that "special fund" taxes are a novel breed of tax to which the traditional criteria of civil and criminal responsibility are inapplicable.

that criminal liability depends upon proof of evil motive or bad purpose. Levy v. United States, 140 F. Supp. 834; Nugent v. United States, 136 F. Supp. 875; In Re Haynes, 88 F. Supp. 379; and Paddock v. Siemoneit, 218 S.W. 2d 428, 7 A.L.R. 2d 1062. These cases hold that it is enough to warrant imposition of the civil penalty that the defendant's actions were knowingly and intentionally taken. See also Rev. Ruling 54-158, 1951-1 Cum. Bull. 247. Compare Kellems v. United States, 97 F. Supp. 981, and 50-2 USTC at 9489 (1950), and Cushman v. Wood, 56-2, USTC at 9690 (1956), holding that mere intentional failure to pay is not even sufficient for civil purposes.

The oft-cited opinion in Paddock v. Siemoneit, supra, states that the term "wilful" in criminal tax statutes refers to motive or purpose whereas in the civil statute it characterizes intention and knowledge. The facts of that case closely parallel the instant factual situation. There it was held that the president of a corporation was civilly liable for the corporation's failure to pay withheld taxes where the reason for non-payment was that the corporation was in precarious financial condition and the withheld funds were employed to preserve the corporation. Here, too, the evidence is certainly sufficient to support a finding that the failure to pay was intentional and that the defendant was responsible for such failure. But that is not enough to justify a criminal conviction. To warrant imposition of the heaviest of penalties assessable for

non-payment of taxes, the principal purpose of all such penalties being compliance, it must also be found that the defendant's conduct was prompted in part at least by tax evasion motives. This the trial court did not do.

The trial court's conception of the requisite subjective element under § 2707(c) was voiced at length during the progress of the trial and was reiterated in comments which accompanied the formal verdict. Of course, as those experienced in trial matters know full well, it is a hazardous and risky business to place too much reliance upon comments emanating from the bench during the course of a trial. The strained atmosphere of the trial arena, and the lack of opportunity for careful, studied consideration of the problem, is not conducive to dispassionate, deliberate and definitive comment. An able and alert trial judge, responsive to his responsibilities, will frequently intersperse questions and clarifying comments during the trial to clarify troublesome points, elicit certain evidence or state tentative views. Litigation would never be terminated if appellate courts seized upon isolated remarks of trial courts to award new trials. See United States v. Wain, 2 Cir., 162 F. 2d 60, 65. However, there are cases where the trial court's views are set forth with certitude and clarity. This is such a case. To disregard these clear statements of the court's views, as expressed on numerous occasions, is to ignore reality. The most significant of these comments are set

forth below.[13] A thorough grasp of them is indispensable if the problem which faces this court is to be fully comprehended.

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[13]The first full exposition of the trial court's approach to the subjective element required to be proved under § 2707(c) came during argument by appellant's counsel, Mr. Avakian, following the presentation of the Government's case-in-chief, on the motion for judgment of acquittal. After Mr. Avakian had set forth his conception of the essential elements of the offense and related them to the instant facts, he was queried as follows:

"The Court: Do you think that there is any difference with respect to this argument as between the payment of the taxpayer's own taxes and withholding taxes?

"Mr. Avakian: I don't think so, your Honor.

"The Court: I see the force of your argument and if this were a case that involved the taxpayer's own taxes—income taxes, we will say—and the full disclosure by return of the amount due, and then the handling of his business in the manner that the records here disclose that it was handled, then I see the force of the argument as to the principles that have been laid down by the courts with respect to wilfulness and acts of commission and like matters that would probably defeat a criminal charge. I am wondering whether or not there was any difference in the application of that argument in the case of taxes of someone else that the employer is required to withhold and pay, whether there is any difference there. Is the use of the trust fund, so-called—they have been described as trust funds to rather loosely designate them—but does the use of the trust funds themselves give rise to an inference to wilfulness as an act of commission as differentiated from the case of the taxes due by the taxpayer himself? There is a novelty here in the application of that rule that you speak of. I was wondering if you had any thoughts concerning that." [Tr. 557.]

That problem is what effect should the trial court's failure to apply the proper standard of the

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The Court continued to express the same idea.

"The Court: It seems to me that that is the bigger question, as to whether or not this doctrine which you speak of (the Spies decision) applies to a withholding tax case, and that presents a little different question than is presented in these decisions." [Tr. 564.]

Finally it turned to conviction. We trace that development:

"The Court: It doesn't make any difference whether or not in using that money that the taxpayer got more money from affiliated companies than he paid out. I don't think it can stand or fall on that at all.

"Mr. Avakian: I think it is important in this respect, your Honor: Not only must there be the wilful acts of commission, but they must be done with the specific evil intent of defeating the payment. Now, that is where I think it becomes material to know whether there was a net inflow rather than an outgo because that throws light on whether there was necessary evil intent, and it is in that respect that I think it is significant to know what the flow of funds was, because if there were only a factual showing of a knowing and intentional use of these funds for some other purpose, that would not be enough. There would also have to be evidence which would support the inference and the finding that that conduct was done for the purpose of defeating the payment of the tax. That's the distinction, of course, between this type of statute that the Spies and Murdoch cases talk about, wherein the administration of those revenue laws, the penalty is imposed for violation of them but there must be a showing of an evil or bad motive and that good faith is a defense to the charge. Now, that's where I think the flow of funds becomes material.

"The Court: I think that what you said is a perfectly logical conclusion to be drawn from the prin-

subjective element under § 2707(c) have upon the disposition of this appeal?

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ciples of the Spies case in connection with income taxes due from a taxpayer. In other words, it would be necessary to show some affirmative action with an evil motive to use the property of the taxpayer which would be available for the payment of taxes or his monies for the purpose of defeating the purposes of those taxes. If he used his property in connection with the normal activities of his business and they proved to be untruthful or he misjudged the consequences of it, he lost it, he was thus unable to pay his taxes, of course, it wouldn't be the kind of motive that is required to prove violation of the statute. That is why it is in order to draw the line between those acts, that philosophy that we have long ago got away from, that you imprison people for debt. As Justice Jackson said in the Spies case, there has to be some affirmative act of fraud to show that something was done with the property or assets or money of the taxpayer for the deliberate purpose of evading the payment of the taxes due.

"However, the question becomes, it seems to me, somewhat different when you come to the withholding taxes under this statute because there it may be very properly said that the mere act of using this money which doesn't belong to the taxpayer at all—the money that he has, that he owes for his own taxes, that is his own money, and, of course, there you have to go much further in order to develop a criminal charge and that's the reason for that philosophy that is expressed in the Spies and those other cases. But the question here is this was not his money. This was money that was due somebody else, but which the law imposed upon him an obligation to hold and pay the United States.

Now, the question is under the circumstances of this case of the non-payment of these monies and the obvious use of them, whether the use of the money was well intentioned or not, in the hope of

There is surprisingly little authority respecting the question of the effect upon a conviction of a trial court's misconception regarding an essential element of the offense in a non-jury case. Indeed, we

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making some of the enterprises work out and so forth, that the use of that money under those circumstances was a bad motivated act. And that, it seems to me, is the rather simple question that it boils down to. Of course, none of these questions are simple but it is a rather simple question to which it boils down. I don't think that it is necessary to show bookkeepingwise what the net balance was with respect to these transfers, but whether or not under the circumstances of these various corporations and companies, whether or not the use of that money under those circumstances constitutes the affirmative act that makes up the violation of the statute. And that is a bigger question, it is a broader question. All the circumstances of the case have to be taken into account, except that I don't think that what the outcome bookkeepingwise of the transactions is has anything to do with it. It is whether or not the act of using that money in connection with these various corporations is a wilful act under the circumstances, it was done knowingly, it was done consciously, all the circumstances that make up the act of withholding and non-payment, whether the circumstances surrounding that justified a conclusion that that act of non-payment and use, irrespective of what the result of it, constitutes a wilful act, that I think is the question in this case * * *" [Tr. 568-571.]

Mr. Avakian continued to urge that there was no evidence that any transfer of corporate funds was attributable to evil motivation. The trial court's reply, clearly delineating its views, follows:

"The Court: But I don't think that has anything to do with it. You are basing that upon the point that you raise that the government has to

find no direct authority. However, analogous decisions involving jury cases and several basic principles of criminal law furnish clear guideposts to a resolution of this issue.

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prove that the means used were with fraudulent intent. I couldn't agree with you on that, that there had to be proof by the fact of inference that any step that was taken in connection with the matter in itself, that particular step, had to be taken with the evil motive and intent to defraud the government. I couldn't follow that because we have those questions constantly raised in conspiracy cases, for example, that the particular act itself in itself may be of an innocuous nature but if it furthers the purpose of some person who is pursuing some unlawful purpose it is in itself admissible and may be considered as an overt or an act done pursuant to a purpose which is against the law. So that I don't think that it has to be shown that a particular transfer out was with that intent; I don't think that that is necessary." [Tr. 579.]

During the argument to the court which preceded the rendition of the verdict, the trial court had occasion to reiterate its views. As is readily discernible no change had occurred in respect to these views throughout the presentation of the defense.

"The Court: I don't attach any particular importance to these so-called in-and-out transactions. I think I mentioned that once before in the trial of the case.

"I think the District Attorney (sic) did make some contention to that effect, but I don't think it is of any importance in the case as to whether there is any evidence of any concealment or transfer of assets as such for the purpose of evasion of tax." [Tr. 925.]

And again:

"The Court: Well, except that this is a withholding tax case and it is not a tax of the defendant

Initially it should be noted that we are not concerned with such matters as the admission or exclusion of evidence or rulings on non-merit defenses. In such cases appellate courts often invoke the rule applied to civil judgments that if any valid basis

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that is involved. With respect to these taxes, the defendant is merely the collecting agent or trustee collector for the government.

"Mr. Avakian: Well, in terms of the origin of the obligation, of course, that is true. But in terms of the offense that is defined in the statute, I don't think it matters what kind of tax it was, and moreover——

"The Court: Except that the instances or facts that go to make up evasion of payment are different in cases of withholding taxes than they would be with respect to the defendant's own taxes." [Tr. 935-6.]

The Government contends that the comments accompanying the formal verdict show that regardless of remarks voiced during the course of the trial the verdict itself was grounded upon a correct conception of the governing law. We cannot agree. On the contrary, these comments, relied upon by the Government as the strongest expression of the applicable law made by the trial court, seem rather to reinforce the belief that a too stringent state of mind standard was applied herein. The key paragraph of those comments follows:

> "I am satisfied that the evidence shows beyond question that the defendant here knowingly and deliberately set and followed a course of so operating the business of Coast Redwood Company, Inc., as to advantage himself and his companies by the use of the withheld employees' taxes; and that such course of conduct affirmatively constituted wilful evasion of payment of these taxes. This he did with full knowledge and awareness of the nature of his course of conduct and of its consequences." [Tr. 963.]

exists for affirming the action taken below, such action will be affirmed regardless of the particular ground upon which the original decision was rested. Wagner v. United States, 9 Cir., 67 F. 2d 656. That rule is sound and salutary and it furthers not only the ends but also the administration of justice where the erroneous theory worked no hardship nor harm upon any party.

But we are not dealing with a mere error of law occurring during the course of trial and which can be disregarded as harmless. Involved here, (if we are right) is a basic misconception of an essential element of the crime charged against appellant, which in truth is the critical element under the facts. We believe therefore that the comparable and controlling decisions are those jury cases involving the related question of erroneous instructions. If this case had been tried to a jury and the comments voiced by the learned trial judge had taken the form of jury instructions, a conviction obtained thereunder could not stand under the principles enunciated in the Murdock and Spies decisions. Is there any difference between a trial judge formally instructing the jury as to what he thinks the applicable law to be and in effect instructing himself similarly in a non-jury case?[14] We think not. In each instance a conviction has resulted from the application of im-

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[14]Cf., Rule 75(g), Rules of Civil Pro., 28 U.S.C.A.; Mar Gong v. Brownell, 9 Cir., 209 F. 2d 448 (1954); Takehara v. Dulles, 9 Cir., 205 F. 2d 560 (1953).

proper standards of law to the facts by the trier of fact. Such a case, we believe, compels reversal of the conviction.

It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law. As the Supreme Court stated in a jury case in response to such a contention,

"It may not be amiss to remind that the question is not whether guilt be spelt out of a record but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in federal courts." Bollenback vs. United States, 326 U.S. 607, 614-5.

The decisions are plentiful that an appellate court cannot affirm a conviction erroneously secured on one theory, on the speculation that conviction would have followed if the correct theory had been applied. Pearson vs. United States, 6 Cir., 192 F. 2d 681; People vs. Bigley, 35 N.Y.S. 2d 130; People vs. Roper, 259 N.Y. 170, 181 N.E. 88; People vs. Hewlett, 138 CalApp. 2d 258, 239 P. 2d 159; 24 C.J.S. Criminal Law § 1834, p. 676.

It does not matter whether or not guilt is a close question. The accused is entitled in any case to be tried under proper legal criteria. But the significance of this matter is all the more accentuated in a factual context where the question is a close one. This is that type of case. It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by a desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by § 2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under § 2707(a). All these possibilities exist.

Whether particular conduct is "willful" is, of course, a question of fact.[15] By its very nature, it is not generally amenable to direct proof and must be shown by circumstantial evidence.[16] The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained. But the verdict must be rendered under proper and applicable rules of law.

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[15]Gaunt v. United States, 1 Cir., 184 F. 2d 284; Himmelfarb v. United States, 9 Cir., 175 F. 2d 924.

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[16]United States v. Commerford, 2 Cir., 64 F. 2d 28; Capone v. United States, 7 Cir., 51 F. 2d 609.

Another point requires discussion. Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings pursuant to the provisions of Rule 23 of the Federal Rules of Criminal Procedures. Cesaro vs. United States, 1 Cir., 200 F. 2d 232. No such formal request was made in the instant case. However, counsel for appellant repeatedly called the trial court's attention to this matter, and, as indicated previously, the trial court's remarks at the time of verdict bore on it. Moreover, counsel for the Government did not raise the point of Rule 23 on this appeal. Therefore, while we believe resort to Rule 23 ordinarily must be made to preserve such an issue on appeal, we also believe that the circumstances of this case are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.

The other question tendered by this appeal relates to the exclusion of certain evidence, i.e., that appellant, through his attorney, had negotiated and entered into an understanding and agreement with representatives of the Internal Revenue Service in Portland, Oregon, in May, 1955, whereby certain assets were to be sold to pay off Coast Redwood Company's tax obligations. The District Court took notice of the fact of the negotiations and understanding. It refused to allow the attorney to testify

as to the details on the ground that such evidence was immaterial.

The trial judge possesses wide latitude in the determination of the relevancy or materiality of evidence and his ruling cannot be reversed in the absence of an abuse of discretion. The evidence offered went to the defendant's state of mind. It concerned actions taken over three years after the indictment period commenced and its probative value, if any, was slight. We cannot hold under the circumstances that the trial court abused its discretion in excluding the details of the negotiations as distinguished from the fact thereof.

The judgment of conviction is reversed and the case is remanded to the District Court for retrial in accordance with the principles set forth in this opinion.

"The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

Reversed.

[Endorsed]: Opinion, Filed November 14, 1957, as amended by Order of February 27, 1958.

/s/ PAUL P. O'BRIEN, Clerk.

[Title of Court of Appeals and Cause.]

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING

Before: Denman, Circuit Judge; Pope and Barnes, Circuit Judges.

The last paragraph, before the word "Reversed," contained in the opinion of this Court, filed November 14, 1957, is stricken, and the following paragraph substituted therefor:

> "The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

We consider "Appellee's Petition for Rehearing en banc as a petition for rehearing and a suggestion (in accordance with our Rule 23) that the case be reheard en banc. With the modification of the opinion as set forth hereinabove, the petition for a rehearing before the Court as constituted for the hearing of the appeal is denied. The suggestion for rehearing en banc is rejected.

/s/ WILLIAM DENMAN,
Circuit Judge;

/s/ WALTER L. POPE,
Circuit Judge;

/s/ STANLEY N. BARNES,
Circuit Judge.

[Endorsed]: Filed February 27, 1958.

United States Court of Appeals
for the Ninth Circuit

No. 15301

ARTHUR KING WILSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for

reconsideration in accordance with the principles set forth in the opinion of this Court, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

Filed and entered November 14, 1957, as amended by Order Filed February 27, 1958.

[Title of Court of Appeals and Cause.]

ORDER ON PETITION FOR REHEARING AND PETITION FOR RECALL OF MANDATE AND FOR LEAVE TO FILE PETITION FOR REHEARING

Before: Denman, Pope and Barnes, Circuit Judges.

Counsel urge a rehearing, and a recall of our mandate herein dated March 7, 1958, in order to allow such a rehearing. Three cases are cited in support of this position: United States v. Shotwell, 1957, 355 U.S. 233; Lawn v. United States, 1958, 355 U.S. 339; and Mesarosh v. United States, 1956, 352 U.S. 1.

United States v. Shotwell, supra, was a case where defendant was convicted by a jury. The issue remanded had to do with a preliminary question relating to the admissibility of evidence and did

not relate to an issue submitted to a jury. Obviously, had it so related, no partial remand to the District Court would have been possible. But in Shotwell, the District Court judge was authorized to take evidence upon the issue of admissibility of other evidence introduced at the previous trial to make appropriate new findings of fact on that issue, and a new final judgment on that issue.

In Lawn v. United States, supra, it is true the minority, speaking through Mr. Justice Harlan, thought the issue of whether "untainted" duplicates of the "tainted" check and stub were in the hands of the New Jersey Federal authorities should be remanded to the District Court by "partial remand;" while the majority of six thought this action unnecessary because of the lack of any objection to the evidence entered by defendant's counsel at the trial. But we emphasize that the majority thought such partial remand unnecessary—nowhere does the majority question the right of the appellate court to order such a partial remand.

In Mesarosh v. United States, supra, the majority merely established the rule that had this been a jury trial, we could not properly order a partial remand as to issues passed upon by the jury below (United States v. Shotwell, supra), although the minority felt under the circumstances there existing such partial remand would be proper.

This was not a jury trial. The partial remand heretofore ordered is proper. 28 U.S.C., § 2106.

Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115.

The petition for rehearing is denied; the petition for recall of mandate is denied.

April 16, 1958.

/s/ WILLIAM DENMAN,

/s/ WALTER L. POPE,

/s/ STANLEY N. BARNES,

United States Circuit Judges.

[Endorsed]: Filed April 16, 1958.

In the United States District Court for the Northern District of California, Southern District

Criminal No. 34803

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ARTHUR KING WILSON,

Defendant.

PLAINTIFF'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED FEBRUARY 27, 1958

After waiving a jury trial, Arthur King Wilson was tried between the dates of July 9 and 20, 1956,

and convicted by the Court on six counts of wilfully attempting to evade and defeat the payment of Federal income taxes and Federal Insurance Contributions Act (commonly known as "Social Security") taxes withheld from the wages of employees of Coast Redwood Company, Inc. Wilson appealed to the United States Court of Appeals for the Ninth Circuit, and on November 14, 1957, the judgment of conviction was reversed and the case remanded to the District Court for "retrial," 250 F. 2d 312.

The Government filed a petition for rehearing and a suggestion that the case be reheard en banc. On February 27, 1958, the United States Court of Appeals for the Ninth Circuit entered an order denying the petition for rehearing and rejecting the suggestion that the case be reheard en banc, but modified its prior opinion and remanded the case to the District Court as follows:

> "The judgment of conviction is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

The Mandate was returned by the District Court on March 7, 1958, and the defendant appellant Wil-

son filed a petition for rehearing with the United States Court of Appeals for the Ninth Circuit on the modified opinion which petition was denied by the circuit Court in a written opinion on April 16, 1958, ... F. 2d .....

The Government has introduced no further evidence and the defendant has no new evidence to which to respond. Documentary evidence and oral testimony heretofore having been introduced during a nine-day period and the Court now being still sufficiently advised and informed in the premises, without further need of oral argument, makes the following Special Findings of Fact and draws the following Conclusions of Law, pursuant to the order of the United States Court of Appeals for the Ninth Circuit.

Special Findings of Fact

I.

The Offense Charged

The defendant Arthur King Wilson, hereinafter referred to as "Wilson," was charged with violation of Section 2707(c) of 1939 Internal Revenue Code. In the first three counts of the indictment, he was charged with wilfully attempting to defeat and evade the payment of income taxes withheld from the wages of employees of the Coast Redwood Company, Inc., a corporation, doing business in Samoa, California, hereinafter referred to as "Coast," for the second, third and fourth quarters of 1952, "by

failing and refusing to pay income taxes withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendant and members of his family, and by causing said corporation to use its funds to pay creditors other than the United States * * *" (R. 5). Counts four, five, and six charged Wilson with "wilful attempt to defeat and evade payment of Federal Insurance Contributions Act taxes (commonly referred to as "Social Security" taxes) for the last three quarters of 1952 by the same means as charged in counts one, two and three (R. 8-12)."

II.

Ownership, Direction and Control of Coast Redwood Company and Affiliated Wilson Enterprises

Wilson, his wife and children, owned all of the outstanding stock of Coast (R. 385-386) and owned the controlling stock in some twenty affiliated corporations. Wilson was the president of Coast and also of the other affiliated corporations, with his wife appearing in the organizations as Secretary-Treasurer (R. 177-178; 457). Wilson's familiarity

with tax consequences is admitted by his statement to Special Agent Klass that he formed the numerous corporations to derive tax benefit and that when it was advisable or desirable to form a family partnership, he would sometimes liquidate a corporation (R. 458). Wilson was involved in directing the policies and operations of these companies, giving a large portion of his time to the buying and selling of timber (R. 599-600; 661-662). The close control and contact was such that Wilson was either present at the mill or in touch with its operations by telephone and teletype on a day-to-day basis. When not at the mill, a large portion of his time was spent at the A. K. Wilson Lumber Company Office in Compton, California, or at the site of the logging operations in Humbolt County, California (R. 369-370).

Coast purchased its stumpage from Union Bond and Trust Company, hereinafter referred to as "Union," and from the Ah Pah Redwood Company, hereinafter referred to as "Ah Pah." Wilson was president and exercised supervisory control over all these corporations (R. 661-662). The office address of Coast, Ah Pah and Union was the same, namely, 1101 South West Fifth Avenue, Portland, Oregon (R. 218). Coast did not own the timber tracts from which it obtained the logs (R. 597). Union and Ah Pah each owned part of the timber (R. 597-598). Coast had a license from both these corporations to purchase stumpage for $5.00 a thousand as removed from the woods, with a

minimum payment of $100,000 per year (R. 216-218; 598-599; 674-675). Ah Pah, a wholly owned subsidiary of International Pulp & Paper Company, was not in the business of logging. Wilson and his family owned a controlling interest of International Pulp & Paper Company (R. 674). In 1952 Coast logged both redwood and fir timber (R. 163-164). The fir was sold on the open market and the redwood was cut into cants and sold exclusively to the A. K. Wilson Lumber Company, hereinafter referred to as "Wilson Lumber" (R. 163-164). Wilson and his family owned all the outstanding stock of Wilson Lumber. Wilson was president, member of the board of directors, and principal officer of Wilson Lumber (R. 180; 387-389; 661).

No contract or agreement was produced to show that Coast had a license to cut timber and remove stumpage from timber tracts owned by Union and Ah Pah other than Wilson's testimony.

III.
Nature of the Business Operations Giving Rise to the Tax Liabilities

During the nine-month period, April 1, 1952, to December 31, 1952, Coast withheld income tax of $135,587.13 and F.I.C.A. tax of $11,411.43 from its employees shown on Quarterly Forms 941, but paid over to the United States only $28,919.05, leaving an unsatisfied liability of $118,079.51 as follows: (R. 108; 194-197; and Ex. 1 to 6, incl.).

	Income tax withheld	F.I.C.A. tax withheld	Paid with Return
Second quarter, 1952	$ 49,913.22	$ 5,559.95	—0—
Third quarter, 1952	44,524.53*	3,807.79	$28,919.05
Fourth quarter, 1952	41,149.38	2,043.69	—0—
	$135,587.13	$11,411.43	$28,919.05

*Adjustment of $208.46 not included.

The capitalization of Coast was $5,000.00 in 1947, and the capitalization of Wilson Lumber was $1,-250.00 (R. 703). Hence, operating capital had to be obtained by loans from Union (R. 675-676). Coast's operations were profitable in earlier years. Although Coast suffered an operation loss for the fiscal year ending April 30, 1952, there still remained a surplus of $306,433.04 (R. 802).

IV.

Established Patterns of Delinquency and Failure to Pay Over Income Taxes Withheld From Wages of Employees

Coast had a long record of delinquency in the payment of taxes withheld from its employees, extending back to 1947 and 1948 (R. 662-665; 667-670). Coast had from 200 to 250 employees and a gross payroll of $1,131,743.06 during the period from April, 1952, to December 31, 1952, (Ex. L). In January, 1951, Wilson entered into an agreement with Mr. Cunningham of the Internal Revenue Service to pay the then existing delinquent withholding and F.I.C.A. taxes in weekly payments of $2,500.00 (R. 666-667; Ex. 49). Wilson sold Coast

and other holdings to a Mr. Hull in April, 1951, and received $925,000.00 in cash (R. 663-670). Wilson resumed possession of the mill on December 4, 1951, pursuant to agreement with Hull (R. 664-665). Despite having received $925,000.00 (none of which was returned to Mr. Hull), Wilson used none of this money to pay the delinquent withholding and F.I.C.A. taxes. Wilson stated that he didn't have money to pay the taxes (R. 457-458; 667-670).

Early in January, 1952, Wilson had a meeting with Deputy Collector Quinn relating to the taxes due for the period prior to the sale to Mr. Hull. At that time he agreed to pay $1,000.00 a week on the delinquent liability (R. 685-686). A withholding tax return for the first quarter, 1952, was filed on April 30, 1952, showing taxes withheld from January to March, 1952, in the amount of $44,416.44, but no payment was made when the return was filed (R. 109; 118-119; 667-669). As previously stated Coast has received $925,000.00 from Hull and had a surplus of $306,433.04 as of this date, April 30, 1952, yet no payment was made with the return when filed (R. 802).

V.

The Affirmative Acts Involved in the Offense of Wilful Attempt to Evade or Defeat Payment of Taxes

The Court finds that Wilson wilfully committed the following affirmative acts with the specific intent to evade and defeat the payment of withholding and F.I.C.A. taxes:

1. Instructions to Paul C. Owens, Office Manager, Not to Pay Tax

(a) Wilson was well aware that Coast owed the withholding and F.I.C.A. taxes for the second quarter of 1952 and when his office manager, Paul C. Owens, questioned him regarding the payment of the taxes due for this quarter, Wilson told him not to worry about it he would take care of it (R. 224-225). Wilson also told Owens each quarter when the tax payments were due that he would take care of it, namely, the second, third and fourth quarters of 1952 (R. 274-277).

(b) In the early part of July, 1952, another discussion was held with the Internal Revenue Service Personnel, and Coast agreed to make deposits on each payday thereafter. On July 9, 1952, Wilson instructed Owens by letter as follows:

> "We should start making deposits in the bank to take care of the withholding and Social Security, commencing with the payroll due tomorrow. These deposits should be made as per the Federal requirements each and every month in the future so we will not be default under the requirements." (Ex. 35.)

Owens stated that Wilson countermanded the letter (R. 277-278). True enough, on August 4, 1952, a Special Trust Account was opened in the Bank of America, Arcata, California, upon instructions from Wilson (R. 150-154). However, he instructed that no depository receipts should be purchased (as

per Federal requirements). The deposits in this account were not made subsequent to each payday or in the amounts due (R. 196-197; 269). A total of $28,919.05 was deposited to the Special Trust Account and on Wilson's instruction to Owens no further deposits were made (R. 270). The deposit of $28,919.05 was paid on the third quarter liability of $48, 332.32, leaving a balance due and unpaid of $19,413.27 (R. 107-108; 120-121; Ex. 2).

(c) In the August 28, 1952, agreement with the Internal Revenue officials, Wilson agreed to purchase depository receipts evidencing payment of current withholding taxes on each payday, commencing immediately and that he would furnish current certified financial operating statements (Ex. 33). On Wilson's instructions no depository receipts were purchased or financial statements furnished as per the agreement (R. 267-268).

2. Misleading Statements to the Internal Revenue Service

(a) Wilson made misleading statements to Internal Revenue officials for the purpose of evading the tax payments due. On August 28, 1952, he entered into a written understanding (Ex. 33) providing for payment of $10,000.00 per week from October 4, 1952, to November 14, 1952, and $15,000.00 per week until December 12, 1952, on Coast's delinquent withholding and F.I.C.A. taxes. No payments in the agreed amounts were made, although a few payments were made of lesser amounts.

When the payments were due, Wilson made misleading statements to Collection Officer Richardson and Valdi that he was negotiating for a loan or sale of properties valued at $7,000,000.00 and requested extensions of time within which to put through the prospective sale. The extensions were granted to October 31, November 20, November 28, December 26, 1952, January 9, 1953, and January 31, 1953.

During the trial Wilson introduced no evidence in substantiation of his prior statements to Richardson and Valdi about the sale of the properties. These misleading misrepresentations as to the expectations were placed before the Service officials with regularity on the day preceding the expiration dates as extended from time to time (R. 831-876). In a letter dated January 8, 1953, Wilson advised the Internal Revenue Service as follows:

> "Confirming our verbal discussion today, we hereby respectfully request an extension of time to and including January 31, 1953, for the payment of our withholding and Social Security taxes, which are past due. At that time we also expect to pay the fourth quarter of 1952.
>
> It is understood and agreed that no sale, transfer, disposition or encumbrance is to be made of any assets of the Coast Redwood Company prior to the time said taxes are paid, except that we will continue with our lumber

> operations * * *; and that in the event payment in full is not made on or before January 31, 1953, it is your privilege to exercise your right to seize and sell all the assets of the Coast Redwood to the extent necessary to satisfy the amount due you." (R. 872 Ex. 52.)

Culminating this course of conduct designed to influence the Internal Revenue Service against taking proper legal action of Coast, Wilson voluntarily filed proceedings under Chapter 11 of the Bankruptcy Act on January 30, 1953, (R. 722-723). This act prevented the Internal Revenue Service from taking any further steps to collect the delinquent taxes by ordinary collection procedures.

Wilson testified that Walter E. Heller Company forced Coast into proceedings under Chapter 11 (R. 627). No evidence was introduced to show that the Walter E. Heller Company had any relationship with Coast and Coast records do not disclose any transactions with the Heller Company. Coast records do not disclose that it owed any money to the Heller Company other than Wilson's self-serving testimony that the Heller Company had warehouse receipts for lumber (R. 625-626-627).

The Court finds that the entry of Coast into proceedings under Chapter 11, without notice to the Internal Revenue Service was motivated by a desire to stop legal proceedings by the Internal Revenue Service thereby evading tax payments.

3. Disbursement of Coast's Funds to Affiliate Family Corporations Rather Than Payment of Tax Liability

Coast's disbursements of $2,659,488.89 (R. 463-464) from April 1, 1952, to January 31, 1953, were not entirely for business operations. Included were funds disbursed to himself and/or to his controlled corporations in the total amount of $339,599.75 during the period involved herein as follows:

(a) Coast disbursed to Ah Pah $81,792.28 during the period April 1, 1952, to December 31, 1952, in payment of stumpage (R. 464-465) but these disbursements were $25,000.00 more than the value of the stumpage purchased from Ah Pah during the same period. (R. 810-811.)

(b) Coast disbursed $130,562.47 to Union during the period April 1, 1952, to January 31, 1953, (R. 465) or $14,000.00 more than Coast received from Union during that period (R. 481). The balance due Union at March 31, 1952, had been reduced by Coast from $1,233,675.70 to $165,042.64 at April 30, 1953, (R. 381-382). Coast's books also show disbursements in October, 1952, to Union on Wilson's instructions. Three Coast checks were drawn and diverted directly to Wilson's other enterprises as follows: (R. 179; 231-233; 426-429; 439-442; Ex. 24).

Tungsten & Uranium Corporation	$ 600.00
Washington Oil Company	1,500.00
Mountain States Uranium	1,500.00

Coast had no transactions or dealings of any nature with the foregoing listed companies (R. 232-233; 428-429).

(c) On November 20, 1952, Coast disbursed $19,000.00 to Wilson which he kept (R. 183-184, Ex. 15). At Wilson's instructions, this check was made payable to A. K. Wilson and deposited in Wilson's personal bank account at the Security First National Bank. (R. 184.) By book entry this was shown as a negative account payable to Wilson from Coast, an obvious attempt to conceal the fact that money was being paid over to Wilson as a loan or advance. By book entry after Chapter 11 proceedings had been instituted on January 30, 1953, (two months later) this negative account payable was applied to Coast against its indebtedness to Union, so that, in effect, Wilson was able to collect, for his family-owned corporation, Union, $19,000 of unsecured indebtedness owing by Coast to Union, despite the Chapter 11 proceedings (R. 252-253). Coast's records therefore do not show that the $19,000 was ever returned by Wilson nor is there any evidence that this $19,000 was paid over to A. K. Wilson Lumber Company as a loan from Coast (R. 792-793; 818-821; Ex. M).

(d) During the period covered by this indictment, Coast's accounts receivable, due from Wilson Lumber for the sale of cants to Wilson Lumber, increased by approximately $36,000.00, yet Coast disbursed $107,200.00 to Wilson Lumber on Wilson's instructions (R. 464; 475-476). Actually Coast did

not owe $107,200.00 to Wilson Lumber and there is no justification to warrant this dissipation of funds to the affiliate family corporation. Wilson and his wife drew a net of $85,089.00 from Wilson Lumber during the indictment period. Wilson drew a net of $71,189.00, while his wife drew a net of $13,900.00 (R. 406-408). These funds were not returned to either Wilson Lumber or to Coast. Thus, part of the $107,200.00 was indirectly diverted to Wilson and his wife. The Court finds that the above-stated acts were wilfully made for the specific purpose of evading payment of taxes as charged in the indictment.

VI.

Receipts of Coast Were More Than Sufficient to Pay the Taxes

Coast's receipts from all sources for the period April 1, 1952, to January 31, 1953 was $2,651,921.45 (R. 200-206; 463 and Ex. 44). Each month's receipts were in excess of $220,000.00. The average of withholding taxes was $15,000.00 per month (R. 929-932). Deposits to the commercial bank account alone show highest balances ranging from approximately $20,000 to $50,000 during the indictment period (R. 131-134; 148-149).

The Court finds that Coast had sufficient funds to timely pay the taxes in question when due.

VII.

Wilson Controlled Coast's Profits

Wilson was able to and did control the book profits of Coast because the bulk of its purchases and sales

were made from and to corporations wholly controlled by Wilson. At Wilson's instructions, adjusting entries were made on Coast's sales to corporations which Wilson controlled. (See, for example, Journal Entry No. 113) made on December 6, 1954, for the year ending April 30, 1953, which reads as follows:

> "A charge to the Union Bond for $323,265.25 and a credit to lumber sales for that same amount with the explanation 'To record price adjustment per A.K.W. 23,510,204 board feet at $13.75 sold to A. K. Wilson Lumber Company.' " (R. 347-350.)

Not only does the above entry evince the fact that Wilson could and did control profits of Coast, it also records a concealment of the increase in accounts receivable of $323,265.25 by the fact that this amount was charged against the Coast indebtedness to Union Bond rather than shown as an additional accounts receivable from Wilson Lumber. In other words, this constitutes another example of a payment of an unsecured indebtedness to one of Wilson's corporations ahead of the other creditors who were entitled thereto under Chapter 11 proceedings. A similar entry was made on April 30, 1951, in the amount of $212,273.22 increasing Coast's sales (R. 259).

Coast also granted Wilson Lumber a 5% discount for nonexistent brokerage fees on log cants (R. 282-283). Wilson thereby reduced Coast's profits by 5% on its sales to Wilson Lumber.

VIII.

Extra Judicial Admissions

Wilson's extra judicial admissions showed that he was tax conscious; that he knew the law and that he was well aware that he was not complying therewith (R. 688-689; 601). Wilson told Special Agent Klass that he knew he violated the letter of the law, but he did not violate the spirit of the law, (R. 456); that * * * he was robbing Peter to pay Paul (R. 457; 498-499); that the corporation was created in order to derive a tax benefit and that the Government rated a low priority (R. 457-458).

IX.

Claimed Fire Loss

The claimed loss due to a fire in August, 1952, was not supported by Coast's records. Coast's records showed no casualty loss from a fire since the cut timber did not belong to Coast until it was removed from the forest (R. 597-599). Coast paid $5.00 per thousand feet as removed from the forest (R. 217-218).

Wilson stated that business was very good in July and August, 1952, and that was a profitable period for Coast (R. 671-673). During the indictment period, despite the fire, Coast records show that cost of supplies increased only $2,000.00 (R. 342-343). Additional equipment purchased by Coast amounted to $1,262.31, and that could not be attributable to the fire (R. 344). The lumber sales were not materially affected (R. 345).

X.

Conclusions of Law

1. The Court has jurisdiction over the parties (and subject matter) in this cause.

2. Section 2707(c), I.R.C. of 1939, under which the accused, Wilson, was indicted, imposes a criminal penalty against "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, * * * be guilty of a felony * * *"

3. The term "person" appearing in Section 2707(c) is defined by Section 2707(d) as "an officer or employee of the corporation * * * who as such officer or employee * * * is under a duty to perform the act in respect of which the violation occurs."

4. Wilson was the chief executive officer of Coast and directed the expenditure of its funds.

5. Possessed of such authority and power, he comes within the definition of a "person" as defined in Section 2707(d).

6. Coast had available sufficient funds to timely pay its tax obligations to the Internal Revenue Service.

7. Wilson set and followed a course of operating Coast's business in order to advantage himself and his various companies by the use of taxes which had been withheld from the employees' wages. He dispersed funds from Coast to himself and/or his affiliated corporations. Wilson knew and was cognizant

of the tax obligations of Coast. He knew and was cognizant of the fact that Coast funds were available for timely payment of its tax obligations to the Internal Revenue Service. Wilson did the above acts and carried on the above course of conduct knowingly and deliberately for the purpose and with the specific intention of evading and defeating payment of the tax obligations of Coast to the Government as set out in the various counts of the indictment.

8. Wilson attempted to evade and defeat payment of withholding taxes of Coast for the second, third and fourth quarters of 1952 by wilfully, deliberately and knowingly failing and refusing to pay income tax withheld from wages of employees to the Collector of Internal Revenue or any other person authorized by law to receive them, and by causing said corporation to fail and refuse to pay said taxes, and by withdrawing and causing funds to be withdrawn from the bank accounts of said corporation for the personal use and benefit of said defendant and corporations owned and controlled by said defendent and members of his family, and by causing said corporation to use its funds to pay creditors other than the United States.

9. By the same methods, Wilson wilfully attempted to evade and defeat payment of F.I.C.A. taxes for the second, third and fourth quarters of 1952.

10. It Is Ordered, Adjudged and Decreed that Arthur K. Wilson, defendant, is guilty as charged in Counts 1-6 of the indictment.

Dated: .....

.....,
United States District Judge.

LLOYD H. BURKE,
United States Attorney;

By /s/ ROBERT H. SCHNACKE,
Assistant U. S. Attorney;

/s/ ROBERT G. THURTLE,
Attorney, Office of Regional Counsel Internal Revenue Service, Attorneys for United States of America.

Affidavit of mail attached.

Lodged June 11, 1958.

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PLAINTIFF'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DEFENDANT'S PROPOSED SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant objects, as more specifically stated below, to the proposed special findings of fact and conclusions of law submitted by the plaintiff for the reasons set forth in connection with each objection. To avoid unnecessary duplication, the findings proposed by defendant with respect to points cov-

ered in plaintiff's proposed findings to which defendant objects are set forth in conjunction with the discussion of defendant's objections to plaintiff's proposals. References to page and line identify the location of the particular point in plaintiff's proposed findings and conclusions. References to the printed record on appeal are indicated as "R....."

1. Defendant objects to the proposal that the Court make its findings "without further need of oral argument" (page 2, lines 20-21). This trial was conducted almost two years ago, and defendant respectfully submits that the reconsideration of the evidence in the light of the opinion of the Court of Appeals calls for reargument of the case. Defendant hereby requests the opportunity for such argument.

2. Defendant objects to the proposed finding that during the period April 1 to December 31, 1952, Coast Redwood paid over to the United States only $28,919.05, while withholding $135,587.13 income tax and $11,411.43 in social security taxes from its employees (page 5, lines 4-9). While the amount of $28,919.05 was the total amount which was applied to payment of the tax obligations of this nine-month period, there were additional payments during the period which applied to prior delinquencies in the amount of $14,054.42 during the second quarter of 1952, $12,500.00 during the third quarter of 1952, and $32,500.00 during the fourth quarter, and an additional $10,000.00 was paid during January, 1953.

(See Exhibits 3, 4, and L.) Defendant requests that the fact of these payments be included in the findings.

3. Defendant objects to the incompleteness of the statement regarding Coast Redwood's operating losses and surplus at page 5, lines 20-21, and requests a more complete finding to the effect that Coast Redwood suffered a loss of $274,323.95 for the year ended April 30, 1952, as determined by the Revenue Agent (R. 801), and a loss of $224,099.32 for the fiscal year ending April 30, 1953 (R. 759), and that the surplus on April 30, 1952, was $306,433.04 (R. 802).

4. Defendant objects to the incompleteness of the proposed findings with regard to the sale to Mr. Hull in April, 1951, as set forth at page 5, line 32, to page 6, line 7, and again at page 6, lines 15-18, of the proposed findings. The uncontradicted evidence is that the sale to Mr. Hull consisted of a portion of the assets of Coast Redwood Company, a portion of the assets of A. K. Wilson Lumber Company, and the stumpage which Union Bond & Trust Company was purchasing from Blue Creek Redwood Company and Sage Land and Lumber Company, and that the $925,000.00 received from Mr. Hull was used to pay obligations that had to be cleared up in order to be in a position to make delivery of the property to Mr. Hull. (See R. 663-71.) The findings of the Court should so state.

5. Defendant objects to the finding that the existence of "a surplus of $306,433.04 as of * * *

April 30, 1952" showed ability to pay withholding taxes with the return filed at that time. This accumulated surplus was reflected in the total assets of the company as of that date and did not consist of money. On the contrary, Coast Redwood's books show that there was a total overdraft in its bank accounts on that date of $45,377.24, taking into account checks outstanding which had not yet cleared the bank (R. 309-10; Ex. H).

6. Defendant objects to the proposed findings that the failure to live up to the terms of the agreement of August 28, 1952, constituted acts of wilful attempt to evade tax. These proposed findings are on page 7, lines 26-32, and page 8, lines 1-9. Such proposed findings are directly contrary to statements made during the trial by both the Court and the prosecutor, as follows (R. 329):

"The Court * * * The defendant cannot be charged criminally with violation of promises under this agreement and I wouldn't consider that in connection with the criminal charge. At this point, at any rate, it seems to me that is extraneous to the criminal charge, as to what the defendant did or did not do in connection with this agreement.

"Mr. Lockley. Your Honor is right, of course, the defendant is not on trial for not having lived up to his agreement. That agreement is in solely for the purpose of establishing his knowledge of the existence of this situation and his knowledge of the requirements of law."

7. For the same reason, defendant objects to the proposed finding that he made misleading statements to the Internal Revenue officials with regard to the promise contained in the "agreement" of August 28, 1952, that he would increase the weekly payments to $10,000.00 per week on October 4, 1952, and $15,000.00 per week in November, 1952. Moreover, the Internal Revenue representatives admitted at the trial that they gave successive extensions of time for the increase in these weekly payments, first to October 31, 1952 (R. 864), then to November 20 (R. 865), then to November 28 (R. 867), then to December 26 (R. 869), then to January 9 (R. 870), and finally to January 31 (R. 870-73). On both grounds, therefore, the proposed finding is improper.

8. Defendant objects to the proposed finding that he made misleading statements to Collection Officer Richardson and to Internal Revenue representative Valdi that he was negotiating for a loan or sale of properties (page 8, lines 9-15), and also to the proposed finding that defendant introduced no evidence in substantiation of his statements to Richardson and Valdi about the sale of the properties (page 8, lines 16-18). The latter proposed finding, particularly, assumes that the defendant had the burden of proving that his representations were true, whereas the burden would be on the Government to introduce evidence of falsity in order to support a contention that these were misleading representations. Not only is there a complete absence of any evidence showing that these representations were false, but,

on the contrary, the Court will recall that the voluminous material submitted to the Court through the Probation Officer in connection with the presentence investigation showed that defendant's representations were true, and that extensive negotiations were being carried on during the period in question and had reached the point of the drafting of documents. This is confirmed by the comments of the Court on August 2, 1956, which are attached hereto as Exhibit 1 (pages A and B).

9. Defendant objects to the proposed finding that various acts were committed "with the specific intent to evade and defeat the payment of withholding and F.I.C.A. taxes" (page 6, lines 23-25). Defendant requests that the Court find that the various acts to which that proposed finding relates were done for the purpose and with the intent of keeping Coast Redwood Company in business, and with the knowledge of the representatives of the Internal Revenue Service.

10. Defendant objects to the proposed finding that "on Wilson's instructions no depository receipts were purchased or financial statements furnished as per the agreement" (page 7, lines 30-32). The record reference furnished by plaintiff for this proposed finding (R. 267-68) contains no reference to instructions from Wilson; it shows that the reason for the failure to purchase depository receipts was the insufficiency of money (R. 268); and the witness (Paul C. Owens) stated that he did not know whether or not financial statements had been

prepared and submitted. Moreover, the subsequent testimony of this same witness shows that he had numerous discussions with the Internal Revenue representatives in which he explained that the accounting firm whose certification was required under the "agreement" of August 28, 1952, would not make a certified statement until the Revenue Agent in Portland, who was then making an audit of the returns of Coast Redwood Company, had completed his audit (R. 330-31). This testimony was confirmed by a memorandum made by one of the Internal Revenue representatives on October 13, 1952 (Ex. 51, quoted at R. 879).

11. Defendant objects to the proposed finding that no evidence was introduced to show that the Walter E. Heller Company had any relationship with Coast Redwood, and that Coast Redwood records do not disclose any transactions with the Heller Company (page 9, lines 18-21). The trial record is silent as to what Coast Redwood's records do or do not show in this respect, since only a portion of Coast Redwood's records were introduced in evidence, and there was no testimony as to whether or not the other records (which were and are in the possession of the Bankruptcy Court) showed anything in this regard. The only verbal testimony on the point is the uncontradicted statement of defendant that the Heller Company was financing Coast Redwood on the basis of warehouse receipts (R. 626-27).

12. Defendant objects to the proposed finding

that the commencement of proceedings under Chapter 11 of the Bankruptcy Act on January 30, 1953, represented a wilful attempt to evade the taxes (page 9, lines 11-28). The commencement of these proceedings placed the assets of the business under the jurisdiction of the bankruptcy court. This can hardly be labelled a criminal act of tax evasion.

13. Defendant objects to the proposed finding that Coast Redwood's disbursements during the period in question were not entirely for business operations, and that disbursements were made to himself or to his controlled corporations in the total amount of $339,599.75 (page 9, line 31, to page 10, line 3). The items making up this total and defendant's objections to the proposed findings in connection therewith are set forth in the succeeding paragraphs numbers 14 to 17, inclusive.

14. Defendant objects to the finding that the disbursements to Ah Pah Redwood Company of $81,-792.28 were not made for business purposes (page 10, lines 4-8). While this total payment exceeded the stumpage purchased from Ah Pah during the same period by approximately $25,000.00, the excess was in payment of stumpage previously purchased but unpaid for (R. 811, Ex. K). Coast Redwood was removing this stumpage on exactly the same terms as were called for in the contract of Ah Pah Redwood Company with the owner of the timber, Sage Land and Lumber Company, namely, at a rate of $5.00 per thousand subject to a minimum of $100,-000.00 per year (R. 598-99). Furthermore, in deter-

mining the motive and intent underlying these payments to Ah Pah Redwood Company, consideration must also be given to the stumpage purchased from the other affiliate, Union Bond and Trust Company, and the evidence with regard to that is that stumpage totalling $70,611.00 was purchased during the nine months in question without any payment whatsoever to Union Bond. Thus, the total payments for stumpage to the two affiliates were $45,000.00 less than the stumpage received from the affiliates (Ex. I).

15. Defendant objects to all of the proposed findings in subparagraph (b), on page 10, lines 9-21.

(a) The amounts set forth therein are based on an unrealistic and untenable combination of bits of evidence, representing in part subsequent journal entry adjustments of transactions occurring outside the period involved in the indictment. For example, the proposed finding that the balance due to Union Bond was reduced from $1,233,675.70 on March 31, 1952, to $165,042.64 on April 30, 1953, implies that Coast Redwood paid Union Bond a net of over $1,000,000.00 during that 13-month period. But the testimony cited for this proposed finding shows that this reduction was principally the result of journal entries, not of transfers of funds (R. 382-83); and the special agent himself identified one journal entry as a reduction by $601,857 because of a 1948 transaction and another as a reduction by $100,692.00 because of a 1951 transaction (R. 509).

(b) The proposed finding that from April 1, 1952, to January 31, 1953, Coast Redwood disbursed $14,000.00 more to Union Bond than it received from Union Bond is true only on the basis of subsequent journal entries which simply transferred certain amounts from the A. K. Wilson account to the Union Bond account without affecting the combined total of both accounts, as the special agent himself conceded (R. 510-13).

(c) The proposed finding that Coast Redwood diverted funds to three other affiliates, in the total amount of $3,600.00, is contrary to the evidence, which shows that these amounts were transferred to those affiliates by Union Bond through Coast Redwood's bank account. The evidence shows that on October 22, 1952, Union Bond transferred $9,800.00 from its account in Portland to Coast Redwood's account in Los Angeles; that on October 22, 1952, Coast Redwood issued its three checks, totalling $3,600.00, to the three affiliates and recorded these as money transferred back to Union Bond; and that the reason for this was that the three affiliates also had bank accounts in Los Angeles, and Union Bond's employees in Portland made a single transfer of $9,800.00 for all four companies instead of separate transfers directly to each one. (See Exhibit 16, page 107; Exhibit 17, page 178-79; Exhibit 32, Account 51-1; R. 441, 681.3, 816.)

(d) The actual transactions between Coast Redwood and Union Bond during the nine months in

question are correctly set forth in Exhibit K, and defendant requests that the findings be based thereon. This shows that, prior to the journal entry adjustments made after bankruptcy court proceedings were filed (which concededly did not affect the over-all picture), Coast Redwood received $151,032.00 in money from Union Bond from April 1 to December 31, 1952, and disbursed $136,390.00 to Union Bond—a net inflow to Coast Redwood of $14,642.00. This was in addition to stumpage accruals of $70,-614.00 for which Coast Redwood paid nothing during this period.

16. Defendant objects to the proposed findings in subparagraph (c), page 10, line 22, to page 11, line 5. The contention that the $19,000.00 check issued by Coast Redwood to defendant on November 28, 1952, represents money transferred to him personally is based on the obviously incomplete memory of an office employee who stated that he did not recall the particular check (R. 183-84, 189-90). It ignores the uncontradicted explanatory evidence subsequently introduced which shows that this $19,000.00 was deposited in defendant's account contemporaneously with a $9,000.00 check issued to him by A. K. Wilson Lumber Company; that on the same day defendant issued his check for the total of these two deposits, $28,000.00, to A. K. Wilson Lumber Company; that the latter treated the receipt of the $28,-000.00 as funds received from Union Bond; and, in short, that defendant's bank account was simply the conduit for a transfer of $19,000.00 from Coast Red-

wood to A. K. Wilson Lumber Company with the transaction treated, for bookkeeping purposes, as a transfer from Coast Redwood to Union Bond and from Union Bond to A. K. Wilson Lumber Company (R. 790-93, 818-23; Ex. M). Clearly, therefore, there is no basis for the proposed finding that this $19,000.00 check to defendant was money "which he kept" (page 10, line 23), or that the subsequent book entry applying this to the Union Bond account was for the purpose of giving a preferred status to Union Bond (page 10, line 28, to page 11, line 2).

17. Defendant objects to the proposed findings in subparagraph (d), page 11, lines 6-20. The disbursements of funds from Coast Redwood to A. K. Wilson Lumber Company were a part of a continuing flow of funds in both directions between the two companies, and the $107,200.00 disbursed to A. K. Wilson Lumber Company was more than matched by the funds which Coast Redwood received from A. K. Wilson Lumber Company. As shown in Exhibit L, Coast Redwood receipts of funds from A. K. Wilson Lumber Company during the nine-month period exceeded by $198,853.00 the combined lumber sales and cash disbursements to A. K. Wilson Lumber Company. There was not, therefore, any "dissipation of funds to the affiliate family corporation" (page 11, lines 11-12). Furthermore, the proposed finding that $85,089.00 of Coast Redwood's funds were indirectly diverted to defendant and his wife through their withdrawal of that amount from A. K. Wilson Lumber Company is not warranted by the evidence for

the further reason that Exhibit 43A (one of the ledger sheets of A. K. Wilson Lumber Company showing its accounts with defendant and various affiliated corporations, not including Coast Redwood) shows that these withdrawals were more than matched by the net amounts which the other affiliates paid in to A. K. Wilson Lumber Company during the same period (R. 412-13).

The proposed finding that Coast Redwood's accounts receivable from A. K. Wilson Lumber Co. increased by approximately $36,000.00 during the indictment period (page 11, lines 6-8) is based on 1954 journal entries adjusting the price of the lumber. This is directly contrary to a specific disclaimer by the prosecutor that he intended to rely on the subsequent price adjustments as evidence of a diversion of funds; and the court itself declared that such matters were not material to the charge (R. 294-9). If these subsequent price adjustments were deemed material, then in all fairness consideration should be given to the fact that appellant was simultaneously having the other affiliates (Union Bond and Ah Pah Redwood) give Coast Redwood a favorable price of $5.00 per thousand on stumpage with a market value of $15.00 (R. 598-9, 646, 657). If the stumpage had been sold to Coast Redwood at market value, the additional cost of $253,966.00 (see Exhibit K, which shows that the stumpage totalled $126,983.00 at the $5.00 rate) would have been approximately equal to the 1954 price adjustments of $269,556.73 on the sales to A. K. Wilson Lumber Co.

during the indictment period. The opinion of the Court of Appeals in regard to this whole matter concludes with the observation that

"A considered analysis of the evidence adduced on this point leads to the conclusion that while some dealings are questionable it does not appear that Coast Redwood Co. flagrantly favored, or was favored by, its affiliates. For example, while it is true that Coast Redwood Co. granted A. K. Wilson Lumber Co. a five per cent discount for nonexistent brokerage fees on log cants sold to it, it is also true that Coast Redwood Co. purchased its stumpage at the same price paid by its affiliates to the timber tract owners."

18. Defendant objects to the proposed finding that the bank account showed highest balances ranging from $20,000.00 to $50,000.00 during the indictment period (page 11, lines 25-31). Such figures are only fleeting balances shown on the bank ledger cards and do not reflect outstanding checks. The latter must be considered in determining availability of funds; and when outstanding checks are considered, the bank balances were in a constant state of overdraft (see Exhibit H and R. 303-12), as the opinion of the Court of Appeals recognizes.

19. Defendant objects to the proposed finding that Coast Redwood had sufficient funds to make timely payment of the taxes when due (page 11, lines 31-2). Defendant requests that the court find,

instead, that, Coast Redwood did not have sufficient funds to pay its total business and trade obligations; that during the indictment period both its business obligations and its withholding tax obligations increased; and that in deciding what payments to make with the available funds from time to time defendant was motivated by the desire to keep the business going and was influenced by the degree of pressure exercised by each obligor and was not seeking to defraud the government.

20. Defendant objects to all of the proposed findings denominated "Wilson Controlled Coast's Profits," at page 12, lines 1-28, for the reasons and on the grounds already set forth above in Paragraph 17.

21. Defendant objects to the proposed findings denominated "Extra Judicial Admissions" at page 12, line 29, to page 13, line 6. The statement that defendant said he knew he had violated the letter of the law but not the spirit of the law is based on the special agent's inaccurate memory of a conversation (R. 456) rather than on the memorandum prepared at the time which, as developed later in the trial, showed that what defendant actually said was that he had not intended to violate the law and that he may have violated the letter of the law but not the spirit (R. 497-8; see Exhibit B for Identification, which is the special agent's memorandum). The other statements in this proposed finding do not show any wilful intent to evade tax.

22. Defendant objects to the proposed findings denominated "Claimed Fire Loss" at page 13, lines 8-21, and requests instead that the court find that Coast Redwood incurred substantial loss of business and of manpower by reason of the large fire in the woods in August, 1952, and that the level of sales during the three weeks of operation in July, 1952, was never reached during the balance of 1952, even though the period of greatest output normally is from August to October (see R. 332-6, 345, 373-5, 651-6).

23. Defendant requests a finding that Coast Redwood filed timely tax returns which correctly disclosed its withholding tax liabilities, and that neither Coast Redwood nor defendant concealed any of such liabilities or the fact of nonpayment thereof from the government.

24. Defendant requests a finding that the nonpayment of Coast Redwood's withholding tax liabilities was a matter of constant discussion between defendant and other Coast Redwood employees and representatives of the government; that the government representatives were armed with warrants of distraint and made a considered decision not to seize Coast Redwood's assets but to permit it to continue in business, notwithstanding their knowledge that the tax liabilities were increasing and that the bulk of the available funds were being used to pay business creditors; and that the government representatives were motivated by the hope that with additional time the business could be saved and the taxes

paid in full (R. 320-32, 603-15, 622-7, 831-50, 862-74).

25. Defendant requests a finding that Coast Redwood never paid any dividends and never paid a salary to either defendant or any member of his family.

26. Defendant requests a finding that he did not wilfully, or with evil motive, attempt to defeat or evade the payment of taxes owed by Coast Redwood, and that he is not guilty of the charges alleged in the indictment.

27. Defendant objects to the following portions of the Conclusions of Law, prepared by plaintiff: Paragraphs Nos. 7, 8, and 9, on page 14, lines 9 to p. 15, line 2. These are recitations of facts, and have been covered in objections previously listed.

28. Defendant objects to Paragraph 10 of the Proposed Conclusions of Law (page 15, lines 3-5), and requests instead that the court adjudge the defendant not guilty on each count.

Respectfully submitted this 30th day of June, 1958.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON, and
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Defendant.

Receipt of a copy of the foregoing acknowledged this 30th day of June, 1958.

LLOYD H. BURKE,
U. S. Attorney;

By /s/ R. H. FORTE,
Assistant U. S. Attorney.

EXHIBIT No. 1

Thursday, August 2, 1956

(Remarks of Judge Goodman following Mr. Avakian's statement prior to imposition of sentence.)

Case of U. S. vs. Wilson

The Court: I have gone through the whole file in this matter. I spent several hours yesterday on it.

Mr. Avakian: Then your Honor is fully familiar with the fact that these were not just casual discussions but were actually lengthy negotiations in which lawyers and accountants participated.

The Court: I read documents and I read the accountants' negotiations. I think that when men get into this business of perspective. How in the world any foundation of the kind that the defendant was negotiating with through this man Walker was going to buy a lumber business—a logging business of this kind for an investment for a foundation is something to me that is incomprehensible; but yet

they spent a great deal of time and prepared a lot of documents, options and agreements and whatnot and submitted them until finally in Florida the man gave them the final "No," because he said that there was still a matter that required a month or more investigation.

I only say that to you not because I question the veracity of this, because it is quite evident that these things were done; but how any one could have any hope of having a foundation of the nature of this Boston foundation buying this kind of an involved business or the property that it had—any one that was operating a foundation that was going to put money into a thing like this ought to have his head examined, that's all I can say. However, it is evident that they did spend the time involved and these documents fully demonstrate that, which, as I say, goes to show the sort of subjectivity that people that are promoting a thing like this have; they can't look at this thing any other way. However, I am just stating this to you to indicate that I think I have a clear awareness of the nature of these activities and that they did take place.

Mr. Avakian: And I am sure that your Honor also noticed that this very foundation during this period consummated the purchase of some farm lands in the San Joaquin Valley for several million dollars.

The Court: That I can understand, but not the purchase of the involved properties that the defendant through his various companies controlled. That to me is incomprehensible. However, if the

promoter is articulate enough, as they usually are, I guess they can make people believe almost anything.

Mr. Avakian: I think your Honor noticed that the stumbling block on this deal was not the price, which apparently was agreed upon, but simply the amount of guaranty; it had reached that point.

The Court: That is what the man from the foundation said. Maybe he had a certain gentility with respect to these matters and that was one way out of it.

(Further remarks by Mr. Avakian, then follow the remarks of Judge Goodman in passing judgment which have been previously transcribed.)

[Endorsed]: Filed June 30, 1958.

[Title of District Court and Cause.]

OPINION, FINDINGS AND DECISION

Heretofore, the Court adjudged the defendant guilty of six counts of wilfully attempting to defeat and evade the payment of employee income taxes withheld by him from employee's wages. § 2707(c), Internal Revenue Code of 1939. Sentence was imposed. Upon appeal, the Court of Appeals, reversed the judgment of conviction and remanded the cause to this Court "for reconsideration in accordance with the principles set forth in this opinion, and for further findings by the trial court, after the Government has introduced evidence, if

any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

The Government elected not to introduce any further evidence. Hence the defendant made no evidentiary response. The Court thereupon heard arguments of counsel with respect to the reconsideration of its former decision. I have reconsidered the former decision in the light of the opinion of the Court of Appeals and of the arguments and written suggestions of counsel.

The Court of Appeals, upon the basis of colloquies between the Court and counsel during the trial, determined that the Court applied wrong legal standards at the time of decision. It would be unseemly to question the premise of this Appellate determination. However, there would seem to be uncertainty as to the nature of these colloquies.[1] It is sufficient to say that at the time of decision the Court adjudged the defendant guilty because it was

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[1]The opinion states: "The District Court took the position during the course of the trial that the knowing and intentional disbursement to others of funds withheld from the employees for payment of income and social security taxes constituted an offense under 2707(c)."

Excerpts from colloquies during the trial are cited in footnotes in support of this statement. But a careful reading of these excerpts, plus an awareness of the practical nature of trial proceedings, clearly indicates that the court took no position with reference to this question but was attempting only to elicit the views of counsel thereon. In fact this was the case.

convinced beyond a reasonable doubt that defendant had wilfully and for the evil motive of tax evasion affirmatively committed the acts charged in the indictment.[2]

No special findings, pursuant to Rule 23 F.R.C.P. were requested. This, of course, means findings requested on specified issues. The opinion of the Court of Appeals recognized that the right to

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[2] "The Court: In this case of the United States against Wilson No. 34803, the indictment charges the defendant, in six counts, with wilfully attempting to evade and defeat payment of Federal income and social security taxes withheld from the wages of employees of Coast Redwood Company, Inc., a corporation controlled by defendant and members of his immediate family and of which he was president. The six counts concern the second, third and fourth quarters of 1952; three counts deal with withheld income taxes and three counts with withheld social security taxes.

"The charge is laid under Section 2707(c) Title 26 USC (1939 ed.), which makes it a felony to 'wilfully attempt to evade or defeat payment of taxes.' Section 2707(c) must be distinguished from Section 2707(b), which latter section makes it a misdemeanor to wilfully fail to pay any tax required to be paid. Section 2707(c) and 2707(b) are replicas of Sections 145(a) and 145(b) of the Internal Revenue Code.

"The Supreme Court in Spies vs. United States, 317 U.S. 492, held that to sustain a conviction under Section 145(b) [1005] of the Internal Revenue Code there must be evidence of 'affirmative' action in order to make out a cause of wilful 'attempt' to evade a tax or payment thereof—a purely negative act of nonpayment being insufficient.

"The issue here in this case is whether the government has presented evidence, sufficient to satisfy

special findings had not been preserved on appeal, but declared that the circumstances of the case required that appellant (defendant) be given "the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense.

Findings

The Court finds that its "conception of the constituent elements of the offense" is the same now as

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and meet the 'Spies' standard, which is convincing beyond a reasonable doubt of the defendant's guilt.

"I am satisfied that the evidence shows beyond question that the defendant here knowingly and deliberately set and followed a course of so operating the business of Coast Redwood Company, Inc., as to advantage himself and his companies by the use of the withheld employees' taxes; and that such course of conduct affirmatively constituted wilful evasion of payment of these taxes. This he did with full knowledge and awareness of the nature of his course of action and of its consequences.

"We have not here, as suggested by counsel, a simple case of a merchant engaged in a continually losing business eventuating in unpaid debts to creditors including the United States. In my opinion, this is a flagrant case of a pattern case of evasion knowingly, wilfully and consciously commenced and carried out. Consequently the defendant is guilty of wilfully attempting to evade the payment of the taxes in question under the standards fixed by the United States [1006] Supreme Court.

"The motion for judgment of acquittal is denied. The motion to strike Exhibit 43(a), which has not already been ruled on, is denied.

"The Court finds the defendant guilty on all six counts of the indictment." R.p. 962, 963.

it was at the time of judgment, namely that for a conviction the evidence must show beyond a reasonable doubt the defendant wilfully and with the evil affirmative motive of tax evasion committed the acts charged in the indictment in violation of Section 2707(c) of the Internal Revenue Code of 1939.

The Court was and is convinced beyond a reasonable doubt and finds that the defendant wilfully and with the evil motive of tax evasion did commit said acts.

Decision

Wherefore the Court adjudges the defendant guilty of the charges set out in counts 1 to 6, inclusive, of the indictment. August 1, 1958, at 10 a.m. for sentence.

Dated: July 28, 1958.

/s/ LOUIS E. GOODMAN,
Chief Judge.

[Endorsed]: Filed July 28, 1958.

United States District Court for the Northern District of California, Southern Division

No. 34803

UNITED STATES OF AMERICA

vs.

ARTHUR KING WILSON.

JUDGMENT AND COMMITMENT

On this 8th day of August, 1958, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty, and a finding of Guilty of the offense of Violation: of Title 26, United States Code, (1939 Ed.), Section 2707(c), as made applicable by Section 1430, as made applicable by Section 1627—Evading Payment of Taxes Withheld from Wages as charged in All Six (6) Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months and pay a fine to the United States of America in the sum of Five Thousand ($5,000.00) Dollars on Count One of Indictment.

Further Ordered that defendant be imprisoned for a period of Eighteen (18) Months on each of Counts 2, 3, 4, 5 and 6 of the Indictment, said sentences to run Concurrently with each other and Concurrently with sentence imposed on Count One (1).

Total Imprisonment—Eighteen (18) Months.

Further Ordered that execution be stayed until August 11, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LOUIS E. GOODMAN,
United States District Judge.

The Court recommends commitment to: an institution to be designated by the U. S. Attorney General.

[Endorsed]: Filed and entered August 8, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendant named above hereby appeals from the judgment of the above-entitled Court rendered in the above-entitled matter on the 8th day of August, 1958, and respectfully states as follows:

1. Appellant's name and address are as follows: Arthur King Wilson, 2025 Meadowview Lane, Reno, Nevada.

2. The names and addresses of appellant's attorneys are as follows: Spurgeon Avakian and J. Richard Johnston, 900 Financial Center Building, Oakland 12, California. Telephone: GLencourt 2-2133.

3. The offenses of which appellant was convicted are attempts to defeat and evade payment of withholding taxes of Coast Redwood Company, a corporation, for the second, third, and fourth quarters of 1952 in violation of Section 2707(c) of the Internal Revenue Code of 1939. The First, Second, and Third Counts involve the income tax withholdings from the wages of employees of said corporation for said quarters, respectively, and the Fourth, Fifth, and Sixth Counts involve the Social Security tax withholdings from the wages of said corporation for said quarters, respectively.

4. The judgment of the Court was that defendant be confined in an institution designated by the Attorney General for a period of eighteen months on each of said six counts, all sentences to run concurrently, and that the defendant be fined the sum of Five Thousand Dollars ($5,000.00) on the First Count of the Indictment. Judgment was rendered on August 8, 1958.

5. The Court, on August 8, 1958, granted a stay of execution of said judgment until August 11, 1958, and also fixed bail pending appeal in the amount of Two Thousand Five Hundred Dollars ($2,500.00), provided that a Notice of Appeal be filed.

6. Appellant appeals from said judgment to the United States Court of Appeals for the Ninth Circuit.

Dated this 8th day of August, 1958.

SPURGEON AVAKIAN and
J. RICHARD JOHNSTON,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed August 8, 1958.

The United States District Court, Northern District of California, Southern Division

Criminal No. 34,803

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ARTHUR KING WILSON,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. Louis E. Goodman, Judge.

Appearances:

For the Government:
LLOYD H. BURKE, U. S. Attorney, by
ROBERT H. SCHNACKE,
Assistant U. S. Attorney.

For the Defendant:
AVAKIAN & JOHNSTON by
SPURGEON AVAKIAN, ESQ.

July 18, 1958

The Clerk: United States versus Wilson.

Mr. Schnacke: Preliminarily I should state that the mandate of the Court of Appeals has been handed down and that this Court is under instructions from the Court of Appeals to reconsider the evidence in this case for the purpose of making findings, meeting certain of the problems that were outlined by the Court of Appeals in their Opinion which was reported at 250 Fed. 2d 312. In that Opinion, at page 318, that Court points out that:

"The conduct rendered felonious by Section 2707(c)"—which, of course, is the section of the Internal Revenue Code under which the indictment in this case was brought—"contains two constituent elements. They are a particular subjective state of mind—'wilful'—and certain objective activity carried on pursuant to such mental state—'attempt to evade or defeat the payment of the taxes.' They must coexist to constitute an offense. In other words, the defendant must have wilfully engaged in the attempted evasion."

Then, at page 320 of that Opinion, the Court points out that the phrase "in any manner," which is used in Section 2707(c), "covers novel and unusual as well as common methods of evasion, for it is all-inclusive."

There are certain citations and the Court goes on to say: [2*]

"Consequently, the diversion of available funds

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to affiliates and other creditors in preference to payment of government obligations qualifies as an affirmative act under the statute and would warrant conviction, if done with the requisite state of mind."

Now, a reading of the record again of this particular case makes it plain to me, as, unfortunately, it did not to the Court of Appeals, that this Court was fully aware of the elements of the offense as the Court of Appeals has outlined. Nonetheless, the Court of Appeals, at page 321 of the Opinion, points out in the second column:

"To warrant imposition of the heaviest of penalties assessable for nonpayment of taxes, the principal purpose of all such penalties being compliance, it must also be found that the defendant's conduct was prompted in part at least by tax evasion motives. This the Trial Court did not do."

As I say, with respect to that, I am at total disagreement with the Court of Appeals but obviously we are bound by that opinion and it is therefore necessary for that opinion to be taken into consideration in preparing the findings that have been ordered. As I say, a reading of the record makes it perfectly clear to me that your Honor was fully aware of the necessity that the tax evasion motive be made out, that wilfulness was an element of this offense, and I am entirely satisfied that your Honor's judgment of guilty in this case was based upon no misconception of the underlying law but on a full awareness of the facts, that there was required to be shown a combination, not only of the

acts of this defendant that very successfully avoided the making of payments over of the withholding taxes and other taxes that were withheld pursuant to his direction, but also of the fact that his state of mind in so doing was the state of mind described by the Court as a necessary element in this offense.

However, the Court of Appeals, at page 325, point out what they considered to be three possible circumstances that may have existed under the state of the evidence in this case. In the first column they say:

"It may be that appellant directed disbursements in good faith and solely for the purpose of preserving the business, or it may be that he so acted in part to evade or defeat the payment of taxes. It could also be that the disbursements were not made with intent to evade the payment of the taxes, but that the failure to pay was itself motivated by desire to evade the payment of the taxes, in which case appellant could be convicted of the misdemeanor created by Section 2707(b). And finally, it may be that appellant did not commit any crime, and could only be held civilly accountable under Section 2707(a). All these possibilities exist."

The statement that "All these possibilities exist" I take it to be a statement that under the evidence any one of those possibilities would be supported by the factual information contained in the record. Accordingly, that the evidence would, as it stands in the record, support a conviction of the felony

charge under Section 2707(c), and the Court has specifically said that they find that the evidence does support the judgment of conviction rendered by the Court but it is only because of an excess of caution, I suppose, on the part of the Court of Appeals that they found it necessary or desirable to reverse.

We have submitted to your Honor proposed findings of fact which state in detail the various elements of the offense and the evidence that was adduced at the trial to establish the elements of the offense in each of the charges of the indictment. I think this is not the time to argue the credibility of witnesses, to attempt to give weight as between the defense testimony and the government testimony, or to try to decide as between contradictory testimony. As I say, I am satisfied that your Honor was fully aware of the requirements of the law. I take it that your Honor's decision that this defendant was guilty was based upon an understanding both of the law and of the evidence in this case, and I think at this point the significant attention should be directed towards a brief summary of the facts of this case in order that we may see from those facts [5] whether or not they do, indeed, make out the evidence of the state of mind that the Court of Appeals says must be found in a case of this sort.

Basically, as I visualize the activities of this defendant, one of the most significant of all of the facts is the existence of these thin corporations with which he operated. The Coast Redwood Company was organized with the capitalization of $5,000. The

A. K. Wilson Lumber Company was organized with the capitalization of, I think, $1,250. Both of those corporations engaged in transactions running into the millions, and those corporations were organized with the intent that they should engage in just that type of transaction and on that scale, so it is quite clear, I think, that when those corporations were formed, they were formed with the idea that the operating funds were to come, not from the investment in the corporate stock, not from real capital, but that the operating funds were to come from periodic advances from one of the multifarious corporations controlled by the defendant in this case. And when we examine the operations of the companies, we find that that is exactly what happened. Moneys were advanced, were transferred, were circled around in circuitous manners under such circumstances as to permit every company that the record gives information about to be judgment-proof at practically all times. The operating assets, for example, of Coast Redwood Company weren't owned by Coast Redwood Company, they were owned [6] by affiliate companies. When Coast Redwood went into the Chapter 11 reorganization. As a matter of fact, this defendant even tried—at that time through some inadvertence apparently some of the operating equipment had been permitted to appear to be standing in the name of the Coast Redwood Company, and he tried furiously to get even that out of the Chapter 11 proceedings, because obviously he never intended that that sort of thing should happen, that any company that was liable

for its bills should ever have any assets on hand to pay the bills, and the record makes it amply clear whenever Mr. Wilson is describing transfers of funds from one corporation to another, he points out that the money was transferred because there were checks outstanding that had to be covered. The only time he and the affiliate companies got around to putting any money into the ventures was when checks were outstanding that were going to withdraw it from the ventures immediately. So it seems to me that these organizations were conceived, organized and operated in a fashion that was designed to and that did permit a defrauding of all creditors, and that includes, of course, the United States of America. The activities were made in a fashion that prevented any creditor, including the United States, from ever stepping in and protecting its rights, and the activities of the defendant were such that a tremendous onus would have been placed upon any creditor, and particularly on the United States, if these organizations were shut down and [7] with the result that a variety of men were put out of work by action of the United States, and it was on that that this defendant capitalized.

Coast Redwood Company, organized in 1945, had by the beginning of 1950 or '51 some half million dollars in earnings over the period of its activities up to that time. At the beginning of the indictment period, after a loss of over $200,000, they still had remaining over $300,000 in earned surplus that resulted from the earnings of the corporation in prior

years. And yet during the period of time that this corporation, with a $5,000 capitalization, had earned over a half a million dollars its obligation to the United States on taxes withheld from employees was in default during substantially all of the time.

There has been dispute, and your Honor pointed out that he thought the dispute was unnecessary, as to whether transfers of funds that were made as between the various affiliated companies resulted in a net increase of funds in Coast Redwood or a net outgo of funds from Coast Redwood. Your Honor said that he felt that that was not a significant detail, and I am inclined to agree. As I say, the nature of the capitalization of this company was such that it was absolutely imperative and contemplated from the beginning that funds would come in. The only way it could operate would be for there to be the periodic advance of funds from the affiliates. But there was no [8] necessary contemplation that funds go out. The incoming funds were absolutely essential for its organization from the very way it was built up at the beginning, but the outgoing funds were something that were entirely under the control of this defendant and something that he directed out for his own benefit and to the detriment of the United States and of other creditors of the organization. So, as I say, whether moneys came in, in net amount as one reading of the books would indicate, or whether there was a small net going out of the company, as another reading of the books would indicate, seems to me to be totally meaningless. The money going out did

not have to go out unless it was going out to the United States in payment of—at least in part—of the tax obligation that this defendant had. The record makes it amply clear, too, that at all stages of the period of time covered by the indictment there were ample funds on hand to pay the obligations, and the statements made by the defendant over and over again that he didn't have money on hand is a meaningless thing. What he meant is he didn't have enough money on hand to do everything with the money that he chose to do, but there was at all times and during every month of this period sufficient moneys on hand for him to have paid this obligation to the United States and he deliberately handled his funds in a fashion that prevented that from being done.

The whole attitude of this man toward the United States [9] Government and the Internal Revenue Service has been one of stall from the first time that the record talks about any of his activities in connection with the Internal Revenue Service. The record is just replete with promises and broken promises, with commitments and failures to perform the commitments, with directions to his employees to ignore the promises that had been made, and most significant of all, I think, is the indication of this man's state of mind when your Honor questioned him. That is page 696 and following of the record. Your Honor was questioning the defendant concerning his promise and commitment made in August of 1952, and he made it clear to your Honor at that time that when he made that promise he had

no intention of living up to the obligation. He was promising in August of 1952, something he says he didn't think that he was going to be able to perform; he would do it if he could. And there is one point in the record where he points out—I think that is at page 669 of the record—there was one time during the summer, I think of 1951, in which business was pretty good, apparently he had money he didn't know what to do with, and he said at that time, "I was happy to pay some part of it to the United States." But those are apparently the only circumstances under which he would find it necessary or desirable to make any payment to the United States.

So, as I say, we have a record of promise after promise being broken, of funds being handled in a fashion that permitted [10] this man to control all of the financial positions of these companies; the price at which he bought merchandise was controlled by him; the price at which he sold merchandise was controlled by him. We discover, for example, by adjusting an entry made long after the fact he can adjust the profit as between companies. If one company has too much profit, why, he simply makes an adjusting entry a couple of years later in the records of the organization and then clears that profit off in a fashion and reduces it in one case and increases it in another corporation where it does him some more good. He was using these corporations as pawns in a chess game that was permitting him to—I was going to say "make monkeys" but

that isn't a very appropriate phrase—but permitted him to deal in a very loose fashion with all of his creditors, including the United States of America, and, as I say, an examination of his testimony and an examination of the broken promises in this case, an examination of the directions that he gave to his employees, show that this was all done consciously, schemingly, designedly for the purpose, at least in part, of defrauding the United States.

Now, I am not at all certain that the United States was the sole object of his scheming. I think it is quite clear that other creditors also were placed in a difficult position by reason of the activities of this defendant. But the only one we are concerned with, and one of the principal creditors of the organization, was the United States, and his [11] activities very clearly were designed to prejudice the ability of the United States to collect the moneys that were owing to it on behalf of the employees of this organization.

The findings as submitted have outlined the instructions given by this defendant to his office manager. I don't think it is necessary to reiterate those. It is sufficient to point out that the control of the funds of the organization were entirely in this defendant's hands, by the testimony and in large part by his own admission that he was the one who decided what payments were to be made and which of the creditors were to be favored by a payment at any given time, and he was the one that decided that the United States of America should have an extremely low priority. He was the man that made

promises to the Internal Revenue Service that moneys would be deposited, and he was the man that countermanded his orders to his subordinates to make any such deposits. He was the man that periodically promised the United States that payments would be made on account and thereafter directed his subordinates not to make such payments.

The findings we have submitted also point out that during the period of April 1, 1952, to January 31, 1953, the disbursements of this organization amounted to over $2,600,000. We have included within that finding the various disbursements that were made by this organization to its affiliate organizations and disbursements that were made to the defendant himself. The [12] suggestion is made, particularly with respect to that $19,000 disbursement to Wilson, that for some reason, the Court of Appeals makes this suggestion, that didn't really go to him because he did something else with it, he passed that on to some other organization. But the fact remains that $19,000 came out of the Coast Redwood Company, it went to Mr. Wilson, subject to his control, and he did with it what he wanted to do, and the mere fact that that money went into another organization doesn't make it any less a withdrawal from Coast Redwood by Mr. Wilson himself.

Another extremely significant thing is the sale of the assets of Coast Redwood Company, or part of the assets, in the year 1951 on which Coast Redwood Company received almost a million dollars. Your Honor may recall the quibbling in the record and

the great tears of grief that were indicated because it was only almost a million dollars. I think some 75,000 wasn't paid in cash, and the record has several pages of Mr. Wilson's feelings that he had been badly treated because $75,000 out of a million had been held out from him. But we have heard no such solicitude for the United States on the amount of money that has been held out from the sums due it. But in any event, in 1951 almost a million dollars in cash was received by Mr. Wilson, by the Coast Redwood Company, in payment for certain of the assets of that organization, and no part of that money was devoted to the liquidation at that time of any of [13] the obligations of Coast Redwood Company to the United States. Instead, all of that money, which was in effect, if not a windfall, at least additional non-operating moneys coming into the control of Coast Redwood Company, and no part of that money, as I say, was used for the liquidation of the obligations of the United States, either of the past obligations or of the current obligations that were ignored from day to day.

As I say, this record is replete with evidence of the method by which Mr. Wilson was using this corporation and other corporations for the purpose of designedly keeping any creditors, including the United States, away from any of the assets of his operating companies. His activities were overt. He very definitely performed affirmative acts that made it impossible for the United States to enforce its rights against his companies. He made misstatements to United States Agents, he made deceiving

statements to them, he made promises that he had no intention of keeping. After making promises he deliberately gave instructions that prevented his subordinates from carrying out the obligations that he had assumed for the corporation. And I think all of these activites can quite clearly be traced to the desire to evade the payment of the taxes that he was obligated to pay over to the United States.

I think this record is strong in support of your Honor's finding that this defendant was guilty of the charges contained in the indictment, and the Court of Appeals apparently agrees [14] that that finding is supported by the evidence. I think an adoption of findings of fact substantially in the form proposed by the United States will support that judgment of your Honor in a fashion that will be acceptable to the Court of Appeals and I strongly urge that the findings submitted be approved.

Mr. Avakian: May it please the Court, I appreciate the fact that Mr. Schnacke did not personally participate in the trial of this matter in which the Government was represented by Mr. Lockley, who is no longer with the Government, and it is therefore simply by way of observation and certainly not by way of any criticism that I would like to point out that the remarks which Mr. Schnacke has made as to the theory on which this case was tried two years ago is not the theory which was being presented to and emphasized to the Court at that time. For example, Mr. Schnacke stated that one of the most significant facts of tax evasion here is the

thinned corporation situation. At the trial, however —not only throughout the trial but in the argument where he was tying everything together—Mr. Lockley emphasized as the most significant fact of all the fact that Mr. Wilson was directing the employees what bills to pay and was, therefore, personally responsible for the fact that some of the available funds were being used to pay business creditors rather than for paying in full the withholding tax obligations.

I think, not only from my participation in the trial but from a reading and re-reading of the record several times [15] since, that it is clear that this novel case, which concedingly was a test type of case, was presented to the Court and was tried on the theory that with respect to withholding taxes as distinguished from a taxpayer's own income tax obligations, that with respect to withholding taxes the knowing use of existing funds for the payment of other obligations, with the knowledge that they were unpaid delinquencies, was itself a wilful attempt to evade tax. This was premised on the fact there is a trust fund type of obligation imposed on the employer with respect to withholding taxes and in this respect the taxpayer is in a different position from his own income tax obligations and, therefore, the idea was that the Court should hold that with respect to funds on which a trust is impressed the mere act of using those funds for some other purpose with knowledge of the unpaid obligation is an act of evasion of payment of a withholding tax.

The Court of Appeals held that even though there is a trust impressed upon the employer with respect to withholding taxes that the obligation imposed upon him by statute is exactly the same as the obligation imposed on him with respect to his income taxes. I am speaking now of his obligation to pay over, and there is a sentence in Section 3661 of the 1939 Code, which is quoted in one of the footnotes of the Appellate Court's Opinion, which says that the obligation to pay over the payment of the withholding tax—that is in Footnote 12 of the Opinion— [16] Section 3661 of the 1939 Code, which, in referring to the withholding tax obligations as a trust, says: "The amount of such fund shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose." And then the Court says, in its comment on this, in the footnote: "Thus, the second sentence, in terms, refutes the notion that 'special fund' taxes are a novel breed of tax to which the traditional criteria of civil and criminal responsibility are inapplicable."

And this matter is then back before this Court for the purpose of having the Court re-examine the evidence to determine whether there is something more here than the knowing use of existing funds for purposes other than withholding tax payment. Is there substantial evidence here which would satisfy the Court beyond a reasonable doubt that what was done was done with the evil intent of try-

ing to evade the taxes, as distinguished from the non-evil intent of trying to keep the business going, trying to hold off all of the creditors as much as possible in the hope that ultimately the financial condition would be such as to permit payment of everybody? And it is with respect to that that we believe that the evidence does not show, and certainly does not show beyond a reasonable doubt, that the defendant was motivated by this evil desire.

I would like to point out to the Court in view of the [17] fact that this was a novel and unique case, as everybody concedes, that Congress has now provided a criminal procedure and penalty which does relate specifically to this type of situation. Early this year, in February, there was enacted an amendment to the Internal Revenue Code which deals specifically with this problem of accumulating withholding tax obligations by businessmen who are in financial difficulties. That is set forth in Sections 7512 and 7215 of the Internal Revenue Code of 1954, which was sent to the President and signed by him in February of 1958. That new procedure provides, in substance, as follows, and because the two sections are two pages long, I will take the liberty of paraphrasing them: Whenever any person who is required to collect and pay over withholding taxes fails to make the deposits, payments or returns of such tax, and he is notified by notice delivered in hand (that is, personal delivery of notice) of such failure, then there comes into play the requirements of the criminal penalty, and the criminal

penalty is that—well, let me state it another way. There comes into play the requirement, after he has received such personal notice, that thereafter, by the second banking day after each payroll payment, he shall deposit the amount of the withholding taxes in a separate bank account, and if he fails to do that, he is guilty of a misdemeanor, and it shall not be any defense to that that immediately after that, the payroll payment, he didn't have sufficient funds on hand to make [18] this deposit in the special bank account.

The committee report, both the Senate and the House reports, show that this statute was enacted for the specific purpose of dealing with the situation of an extremely large number of delinquent withholding tax accounts resulting from business failures or, at least, temporary business difficulties, and the Senate report says that the felony criminal provisions for tax evasion are not appropriate for this type of situation because—and I am quoting here: "The Courts in the criminal cases generally have refused to treat as wilful those cases where the employer failed to pay over amounts withheld because they used the funds in business ventures which were not successful and no longer had such amounts available to be paid over to the Government."

This statute then, first of all, eliminates the wilfulness requirement. Secondly, it provides for this special notice and the obligation following that. And then it provides that a failure to comply is a misdemeanor rather than a felony.

The Court: Do these two new sections specifically repeal Section 2707(c)?

Mr. Avakian: No. I didn't mean to imply that they superseded the prior section.

The Court: This is an additional statute?

Mr. Avakian: Well, I am sure that as to the future the intent of Congress was that this would be the penalty made [19] available for the business difficulty type of situation.

Section 2707(c) of the 1939 Code was, of course, previously repealed and incorporated generally into the tax evasions section of the new Code, and I am sure that the felony tax evasion section remains applicable in situations applying to withholding taxes where there is the requisite deceptive type of conduct.

The Court: In other words, there still could be a prosecution under 2707(c)?

Mr. Avakian: Yes, there could be.

The Court: If the requisite elements were shown?

Mr. Avakian: That's right.

The Court: But there also could be a prosecution in other cases where the elements required to be shown as provided in Section 2707(c) are not present.

Mr. Avakian: That's right. My point in mentioning this is, when Congress specifically dealt with this problem, which has been a problem—there is no doubt—with this problem of widespread cumulative deficiencies in withholding tax payments resulting from business difficulties, Congress felt that the tax evasion felony provisions were not the suitable

remedy for that type of situation, but instead, provided this other.

The Court: They were obviously designed to facilitate the collection of these taxes by the Government, as a [20] practical matter, to provide the means and method of handling that situation by these provisions with the deposit of money in special bank accounts.

Mr. Avakian: Yes. And I think clearly this was designed to enforce by the threat of a misdemeanor criminal prosecution the priority which the Government has as a matter of civil law with respect to these funds by providing——

The Court: By the time this case started there wasn't anything novel about Section 2707(c); it had been on the books since 1939, I think, and, if I recall correctly, the novelty, I think, which I may suggest, arose by reason of the fact that there hadn't been any prosecution under 2707(c)——

Mr. Avakian: That's right.

The Court: ——rather than that there was any novelty inherent in the provisions of the sections.

Mr. Avakian: That's right. And when I referred to the novelty of the case, I meant that this was really a case of, shall we say, a test type of case or the first type of case of its type, as applied to this situation.

Now, unquestionably there were far more funds passing through Coast Redwood hands than the amount of the withholding tax liabilities. There was approximately two and a half million dollars that went through Coast Redwood hands in the period

covered by this indictment, and the withholding tax liabilities were somewhere around a hundred and forty or a [21] hundred and fifty thousand dollars, of which payments were being made, either for current or delinquent accounts, approximately two-thirds of that amount, so we don't mean and never meant to contend that the funds that came in were less than the obligations. But it is also clear that the total obligations, business obligations of Coast Redwood, were greater than its available funds, because after all of the available funds were disbursed, not only did the withholding tax obligations to the Government increase, but the obligations to the other creditors also increased by some $90,000-odd, as the uncontradicted record shows. So that what we really have is a situation in which there were not enough funds to pay everybody and the defendant followed the course of paying where the pressure was the greatest and, in what I think would be typical fashion in the business world, he tried to hold off everybody as long as he could in the hope that nobody would shut him down and that he could extricate himself in these business difficulties either by improved business conditions or by a sale which would give him the money to pay it, and it is that type of situation and that type of conduct which is involved here.

This conduct is not carried on under a blanket or with any concealment from the Internal Revenue representatives, but, on the contrary, by the testimony of the Internal Revenue representatives themselves, this conduct of paying where the pressure

was the greatest and trying to keep going was stated [22] to them and known to them and recognized by them, and even they themselves, armed with the warrants for distraint which would have enabled them to shut down, stated that in their judgment they thought the best interests of the Government would be to permit a continuance of operation and they testified specifically that they knew of course that a continuance of the operation meant that there would be payments made to the other creditors, so that this payment to other creditors, as well as the partial payments to the Government, was something known to everybody on both sides. It was not carried on in any atmosphere of concealment or deception.

The point which is being urged now, that there was a failure to live up to promises, is again undoubtedly because of Mr. Schnacke's lack of familiarity with the trial itself, directly contrary to the position taken by the prosecutor who tried the case, who said specifically that he was not contending that the failure to live up to the promises in that agreement of August, 1952, was tax evasion conduct. He was referring to the agreement, he said, simply to show Mr. Wilson's knowledge of the obligations. And the Court itself joined in that expression by saying that there couldn't be a conviction based on a failure to live up to the promises. The references to that are set forth in my objections to the proposed findings and so I will not repeat them here specifically. But the record is completely clear, both with respect to Mr. Lockley's [23] disclaimer of this

argument and the Court's comments that the defendant couldn't be found guilty for breaking a promise or failure to live up to it. And with regard to Mr. Schnacke's statement that Mr. Wilson in his testimony at page 696 testified that he didn't intend to keep his promise when he made it, the record clearly shows that his testimony was not that, but, rather, that he stated to the Internal Revenue people that he didn't think it was possible for him to maintain this schedule of payments which they were setting up for him, but that, he told them, he would try to do it.

The statement that he told the people at the time, that he didn't think he could keep the schedule, that he would try to do it, is quite different from the contention that he was making a promise with the secret intention of not keeping it. There was nothing secret about his belief that he could not maintain it. And, in any event, there were specific extensions given from time to time, as Mr. Valdi's own testimony shows, and he was the man that gave the extensions for the Internal Revenue; as the time for these increased payments came along, Mr. Valdi, almost on a week-by-week basis, gave the extensions.

In the proposed findings Mr. Schnacke had asked the Court to find—and he hasn't repeated it here—I assume because we have called his attention, by our objections, to certain other matters, but in the written proposed findings there is the contention that Mr. Wilson's statements to [24] Mr. Valdi during

this period, the latter part of 1952, that he was negotiating for a sale and hoped to have a sale consummated for $7 million was a false representation. We have answered that in two ways; first of all, we pointed out that it would be up to the Government to show the falsity of that representation, and there was not one iota of evidence to show the falsity. But your Honor will recall that Mr. Valdi testified as the last rebuttal witness in the case and it was at that time that he mentioned these conversations in which Mr. Wilson had told him that he was negotiating for a sale. Your Honor, I am sure, will also appreciate that Mr. Wilson's office is in Portland, and with these various companies the records are voluminous. Both because there was no contention made testimonially that these representations were false and because of the late stage at which this came and the remoteness of the records, we didn't attempt to go further into that, but, as your Honor recognized at the time of imposition of sentence and we have attached to our objections two pages of transcript of those remarks, there were submitted to your Honor lengthy, thick files which showed the negotiations which Mr. Wilson had mentioned to Mr. Valdi, and your Honor commented that it seemed kind of foolish that this Boston Foundation would be thinking of buying this kind of a business, and I am inclined to agree, and your Honor said, I think, "They ought to have their heads examined." But your Honor recognized, there was no question [25] but that the negotiations had been going on. And I have got the file here again.

It's almost an inch thick—not only with the Boston Foundation, but with the M. & M. Woodworking Company in Portland, and both of these sets of negotiations had, as your Honor will recall, reached the stage of lawyers (Dunne, Dunne & Phelps here in San Francisco) drawing up lengthy contracts and revisions of contracts; there was even an option executed at one point for the $7 million price.

While those things are not in the trial record of this case, your Honor did examine all of this, and I think it would be most unfortunate, as well as unjust, if a finding were now made that there was a deceptive misrepresentation made with regard to these negotiations when, in fact, as your Honor had recognized at the time of sentencing, there was no doubt that the negotiations had been going on, and you will recall that even in January of '53, shortly before the Chapter 11 preceedings were commenced, the broker from Portland and Mr. Wilson made a trip to Florida for the specific purpose of trying to complete the sale with the head of the Boston Foundation.

Now, Mr. Schnacke had not mentioned that in his oral argument, and I assume it is because he learned for the first time, through reading your Honor's remarks attached to our objections, that that was actually the fact, and I am sure that Mr. Schnacke wouldn't want to have asked the Court to make this kind of a finding in view of that. But that clearly shows [26] there is no basis for the contention that Mr. Wilson was deceiving Mr. Valdi when he told

him that he was conducting these negotiations and that there were serious negotiations going on.

Mr. Schnacke has referred to the thin corporation of Coast Redwood in 1945 with a capital of $5,000 as a significant fact tax evasion motivation. I am a little bit surprised at this. First of all, that occurred in 1945, and by 1952, the period we are concerned with, the equity investment of the owners of this corporation as represented by the earned surplus retained in the business was $360,000. Now, therefore, at the time that we are concerned with, the owners of this business had over $300,000 of equity invested in it. They didn't draw out these profits; they let them accumulate as earned surplus, making them available, therefore, as funds for the business and as funds to which the creditors could look, if necessary, for payment.

Your Honor will recall from the record that there was not a single dividend paid by Coast Redwood at any time and that Mr. Wilson and members of his family, these stockholders, never took a dollar in salary at any time during its corporate life.

Certainly these facts would indicate, not that they were trying to remove money from the reach of the creditors, but, rather, that, if the corporation was thinned, as it clearly was, it was not for a tax evasion motivation but, rather, for the [27] normal reason that tax lawyers set up thin corporations, so that when there is time to take some of the profits out of the business, when profits accumulate beyond the needs of the business, that they can be taken out in the form of repayment of loans rather

than in dividends which would be subject to double taxation.

I have participated in debates in the American Bar Association on suggested legislation which would, as a matter of law, make beyond the reach of attack by Internal Revenue in civil cases a ratio of ten-to-one, of thin corporations, of ten dollars of debt to one dollar of equity investment, and the tax section of the American Bar Association finally adopted a recommendation of a six-to-one ratio, and this would, as a matter of law, if adopted, make it impossible for the Internal Revenue to question, even in a civil case, the propriety of the thin corporation.

I mention this simply to show this matter of thin corporation is a familiar method used, a completely respectable basis of setting up corporations without any thought or suggestion that it is a criminal tax evasion device. But even if it were, the fact that there is $300,000 earned surplus left in the business by this period would, I think, clearly negate any thought that Mr. Wilson was trying to remove the assets of this business from the reach of the creditors.

Mr. Schnacke even went so far as to say that the records [28] satisfied him that not only was Mr. Wilson trying to defraud the Government, but he was trying to defraud his other creditors. Now, to me, your Honor, that is an incredible statement, in view of the evidence in this record which came from the attorney for the trustee in bankruptcy, Mr. Tosi, that during the bankruptcy court proceedings Mr.

Wilson gave his personal notes to all of the unsecured creditors of Coast Redwood Company in the total amount of $185,000. Now, certainly that is not consistent with any contention that he was trying to defraud the creditors or that he was a defrauding type of person.

I think we can, certainly with validity, criticize Mr. Wilson for his business practice of putting available cash assets into physical assets, and quite often into timber which was difficult to convert, which was not very liquifiable. As a matter of business judgment, I think he clearly over-extended himself by not leaving enough fluidity in his assets and by keeping his cash position short, and that type of business practice can be successful in the business world if you are riding a favorable market, but when things become a little bit difficult, you get caught up short, and that is what happened to Mr. Wilson. But whether we agree or disagree with his business judgment on that, there is certainly nothing in that type of conduct, which was done openly, which would justify the conclusion that he was a criminal.

Undoubtedly, if he kept more cash available and invested [29] less in physical assets, he would have been able to weather this storm, and unquestionably over the years he followed the practice of trying to delay paying as much as possible because of this shortage of cash, and that again is a matter of business practice and business judgment, with which I would not agree personally—I don't think any of us here would, but that is a far cry from a deceptive or

fraudulent type of conduct which would become a felony under this statute.

Mr. Schnacke has referred to this Hull sale in 1951. First of all, that abortive sale or unfortunate sale was past history by the end of 1951. Well, before the period we are concerned with here. Nothing became available by reason of that sale during the period to which this indictment relates. Secondly, the $925,000 which Mr. Hull paid prior to taking possession was not Coast Redwood's money or payment to Coast Redwood, but, rather, this was a total payment for a contract for the purchase of the assets of three corporations, the A. K. Wilson Lumber Company, Union Bond and Trust Company, and the Coast Redwood Company, so that it related to those three corporate properties and not just the one. But, finally, the uncontradicted evidence is that all of that money, which was paid prior to the delivery of or possession of Mr. Hull, was used to discharge obligations necessary to put these three companies in a position to make delievery. That's where the money went. And there is nothing in the record to justify, [30] even by inference, the belief that any portion of that money was on hand in 1952 as available for the payment of the withholding taxes to which this indictment relates.

Mr. Schnacke has referred to the matter of the transfers of funds between the affiliates. I think that in anything which is as complex accounting-wise as this is, we could probably argue forever on just exactly what dollars and cents amounts represent the transfers in and out. But I think there is no

question in dealing with the basic question, there is no doubt in this record that the transfers of funds and interspersed with the transfers back from the affiliates to Coast Redwood, there is no doubt that the transfers to the affiliates did not exceed the transfers from the affiliates to Coast Redwood. On our analysis of the matter—which I believe is a correct one or I wouldn't have presented it to the Court—we believe that there was a net inflow of better than $250,000 from the affiliates. On the Government's analysis, which takes into account some price adjustments made two years ago, the thing would approximately balance out. Even then, in lieu of those subsequent price adjustments on the sales to A. K. Wilson Lumber Company, if we put the market price on the stumpage which Coast Redwood bought from its affiliate, the $15.00-per-thousand price of market value, instead of the $5.00 paid, we would then again have a net inflow into Coast Redwood. But I think for present purposes we can rest on the fact that there clearly was not a [31] net inflow of funds. The Court of Appeals' Opinion recites there that "* * * it does not appear that Coast Redwood Company flagrantly favored, or was favored by, its affiliates" in these transactions.

Mr. Schnacke takes the position this morning that the inflow of funds from the affiliates is not important but the outgo is, and I think that in making that statement he is again subconsciously perhaps falling back on the contention that Mr. Lockley was making at the trial of this matter, that if you know there are withholding tax obligations and, instead,

you use the money for some other purpose, such as a repayment to an affiliate, that in itself is an act of tax evasion.

I think that the inflow is important because it relates to the question of intent, and the fact that this continuous inter-flow did not favor the affiliates, that there was no net outgo to the affiliates, shows that there was no evil intent in any of these particular payments but, rather, that this inter-flow was simply a matter of trying to get temporary capital for a few days to pay outstanding checks to keep the business going.

If the intent in the outflow in the particular outpayments were tax evasion, if the intent were to put the assets beyond the reach of the tax collector, then it just wouldn't make sense to take back the same amount of money the next week or the next month. So that the fact that as much came back as [32] went out shows that the intent was not to put assets beyond the reach of the tax collector.

Now, since we have in our written objections to the proposed findings set forth at least in brief from the basis for our objection to all of the specific findings that we object to and have indicated in connection with those the findings that we would like to have the Court make, I don't want to take the Court's time to go through those individually. Our objections are 13 pages long, and the proposed findings are 15 pages long. Unless the Court would like to hear argument on some of those particular matters that haven't been mentioned in the oral argu-

ment, I would rest on the statements that are made there and the references made in connection with them.

I would like to close with the observation that, looked at from the viewpoint of whether there was a fraud in the usual sense of that word practiced on the Government, that there is no substantial evidence here which would warrant the finding that it was tax evasion conduct beyond a reasonable doubt. I think we do have the situation here of a businessman who, for whatever the reason may have been, and undoubtedly it could be said that poor business judgment was a part of the reason, but whatever the reason may have been, we have a man whose business had outstanding a total of obligations greater than the money coming in to pay them—that is uncontradicted; there is no doubt about that—and in trying to keep this business going, [33] he parceled out the money with partial payments to the Government and partial payments to his other creditors and in a way which resulted in his going deeper into debt with his other creditors and also going deeper into debt with the Government. But all of this was done openly with the knowledge of the Internal Revenue people, who were conversant with the situation on a week-to-week basis and whose own judgment coincided with the defendant's, that the best way for the Government to get its money out of this situation was to let the defendant continue to operate in this fashion in the hope and expectation that things would work out.

As the Court of Appeals mentioned in its Opinion,

had that expectation (held on both sides) been fulfilled, the case probably wouldn't even be before them. I don't think it would have been brought in this court.

The conduct of Mr. Wilson immediately after this Opinion likewise shows that he was not proceeding on the basis of fraud because, not only did he give his personal notes to unsecured creditors, as I mentioned a moment ago, but during the Chapter 11 proceedings, as debtor in possession, he operated this business on a revised basis, restricted to logging, and eliminating the mill operation, he continued to have his other corporations make available at $5.00 a thousand timber which had a market value of $15.00 and, as a result of operations from about April, 1953, to June, 1954, he built up assets in the bankruptcy court [34] available for the payment of these taxes approximately $170,000 over and above the payment of all the secured creditors that had priority to the Government, he built up this fund, as the record shows, which was then available for the payment of these taxes, subject only to the expenses of the bankruptcy court proceeding and the administration expenses and to a disputed claim of about $13,000. So that, even after he went into the bankruptcy court, when if he had been of a mind to defraud, he could have turned his back on the whole thing, he, instead, made this stumpage available at a very favorable rate to permit the accumulation of money with which these taxes could be paid.

I believe that, looked at from the viewpoint of

whether there is deceptive conduct of the tax evasion type, that the Court should properly find that the defendant here was not guilty.

The Court: Counsel, there are some areas or problems involved in this matter which neither of you has touched upon, which give me some concern, and I would like to call your attention to them. Perhaps we could discuss the matter a little further.

The novelty in this case, in my opinion, is not the novelty of it having been the first case brought under this Section, but the novelty of it now is the posture in which the Court finds itself on the remanding of his case, of a criminal case, to make additional findings in a criminal case where the [35] case was tried by the Court and not by the jury, and where special findings were not requested.

Now, I have some questions to ask of counsel in aid of the Court's understanding of this case and to aid the Court to solve the problem. Before I do so, however, I want the record to be absolutely clear, so that there will be no future need for psychoanalyzing the mind of the Court, that these are inquiries propounded and a discussion for the purpose of aiding the Court and not an expression of the Court's decision in advance of the decision in the case.

There are some problems here that arise by virtue of the nature of the decision. Number one, what sort of findings did the Appellate Court intend this Court to make? It is not too clear to me, but after a careful reading of the Opinion, I don't think that it was the intent of the Court of Appeals that this

Court should make findings of fact on all of the facts of the case, as if it were, upon conclusion of the trial, making the same kind of findings that it would make in some sort of civil case as to whether or not payment was made or transfer made on such and such a date, that it was for this purpose or that purpose or the other purpose. I think, rather, that the clear purpose of the Court of Appeals in remanding this case was to make findings only on the question of the state of mind of the defendant in connection with the transactions involved, and I think that that is the extent to which [36] this Court should go, after hearing whatever you gentlemen have to say by reargument of the facts, as you have already done to some extent, or on the basis of any other reargument that you wish to make as to what finding the Court should make in this case.

On page 325 of the Opinion I find that that apparently is what the Court of Appeals had in mind. Judge Barnes says:

"Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings pursuant to the provisions of Rule 23 * * *"

Since no special findings were requested here, as pointed out by the Appellate Court, and because of their opinion that "The circumstances of the case," they say, "are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense,"

I think that whatever finding this Court should make now should be the simple findings one way or the other as to whether or not the elements of the offense which the appellate Court states to be necessary are present in this case or not. That doesn't in any way prevent any argument on the facts, as the record discloses what the findings should or should not be on the question of intent, but I think that that is the extent of any finding that the Court should make now. [37]

I would try my best to apply what I think is the opinion of the Court of Appeals here. I would find it impossible to make findings of fact two years after the event because, if the decision, the verdict of guilty, was based upon the Court's view as to the testimony of the witnesses and the records in the case at the time the evidence was furnished, I cannot, it is impossible for a court, any more than for a jury, to render a new decision on the same facts two years after the event. That is impossible and I wouldn't undertake to do it, and, unless there is some new, revolutionary doctrine promulgated in this case, I couldn't do it.

So I feel that the only function of the Court to perform here is to make a finding of fact on the basis of the rule of law set forth in the Court of Appeals' Opinion as to state of mind, as to the constituent elements that make up this particular state of mind of the defendant in connection with the acts that were done, and that, I think, is all that I can do.

So that the record may be clear again, there is

nothing new, in my opinion, in the statement of law as made in the Court of Appeals. I am not only bound by it, but I am in thorough agreement with it. I have never had any contrary views to that stated by the Court of Appeals with respect to the necessity of tax evasion motive and wilfulness being present. Despite what is said in the Opinion, I never indicated anything to the contrary. [38]

But, however, as I see it, the question is: What kind of a finding should the Court make, either one way or the other? What is the area of that finding? That, I think, is the important question, particularly in view of the statement of the Court of Appeals, on page 325 of the Opinion; and since there was no request for special findings here, then I think the Appellate Court intends me only to make a finding on the question of state of mind.

Perhaps, since we have kept the reporter going here continuously, we might take a brief recess and then give you gentlemen a chance to state your views further.

(Short recess taken.)

Mr. Schnacke: If your Honor please, first of all, I take it that your Honor's remarks with respect to your familiarity with the record did not relate in any way to your overall recollection of the trial, the witnesses that appeared, the general nature of the testimony that was given in this case. I am sure this case is not that old, that your Honor's recollection—other than the minor details

and, very probably, the analyses of the various documents in evidence—that sort of thing, of course, has faded somewhat into the past, but I feel, certainly from your Honor's remarks today, that you are still fully cognizant of the major elements of the case itself and of the general nature of the testimony given by all of the witnesses, particularly by the defendant himself. [39]

I was inclined and am still inclined to your Honor's point of view with respect to the nature of the finding that is required by the Court of Appeals. Possibly I should have submitted the proposed findings in a different form. I submitted them in the present form in order that all of the matters upon which your Honor might be inclined to make a finding would be before your Honor, and not with the intention that these findings either should or would be adopted in the form in which they were submitted.

I think, too, it is clear from a reading of the Opinion of the Court, the Court feels that if there had been a finding or an indication of a finding and words clear enough to be read while running, the Court of Appeals would not have reversed. It was only because they did not see such a finding as your Honor suggested, that is, to the effect that the intent of the defendant was so and so when these various acts were performed, could not be read into the record by them, that they did reverse. So, I would think that a finding at the present time equivalent to what they say was not found originally should be sufficient.

I might suggest, however, that it would be advisable to relate that finding, whatever it might be —I might urge that it might be the finding that the requisite intent did exist—to certain of the significant pieces of evidence in the case upon which the finding is based. I think it is probably not necessary that the findings be in any way as detailed as those [40] that were submitted by us.

This, as your Honor says, is a totally novel type of remand in a criminal case and I frankly have no more idea than your Honor does of what it was that is contemplated by the Court of Appeals, but I do feel that the findings should be related to those specific portions of the evidence that do appear to bear upon or I suggest that it might be desirable to do that or, on the other hand, it might be desirable only to base it upon the total evidence.

The Court: I find in my own mind some difficulty in determining the intent of the Court of Appeals with respect to the finding. I could not and would not undertake to redetermine the guilt or innocence of the defendant on the record. I do not think that is what the Court of Appeals intended, and it would be an impossible task. No one could do that, no judge could do that.

I want to hear further from counsel in the matter.

I think what the Court of Appeals means is that the Court should make a specific finding as to the state of mind of the defendant so that then it can be determined whether that finding of fact as to the state of mind is warranted by the law, by the statute, and the elements that are necessary as de-

termined by the Court of Appeals for the requisite state of mind to warrant or not warrant a finding of guilty. I can't see that there is anything else that was intended, but I feel that this [41] is the time and is the purpose of the hearing, to give both sides an opportunity to present their views as to not only what they think the finding of the Court should be, but the form of the finding.

Rule 23 provides for special findings but in itself it requires that the particular findings that are requested have to be set out. It says, "* * * shall in addition on request find the facts specially." First of all, there has to be a request for some special findings, and that means that someone has to specify the findings, the issue upon which the findings are requested, because the Court couldn't pick that out of thin air. And we don't have that; that wasn't in the record. The Court of Appeals recognized that, and so they said:

"* * * we believe that the circumstances of this case are such that it would perpetuate an injustice to deprive appellant of the opportunity to question the propriety of the trial court's conception of the constituent elements of the offense."

And so my opinion is at this time, and again I say it is not the decision of the Court but just an attempt to open our minds to suggestions and argument, that that is the only finding that the Court can make in the case, that is, a finding with respect to the motives and state of mind of the defendant.

Mr. Schnacke: Of course we urged to the Court of Appeals that it was inappropriate to turn it

back here for [42] findings at this time in view of the fact that no requests for findings had ever been made by the defense. I take it that it is inappropriate now for us to demand that the defense make a Rule 23 motion with respect to findings, because the Court of Appeals has done that for them, not, however, with the particularity that would be desirable or would be required if the motion were made by the defense.

The novelty of this leaves me, as I am sure it does your Honor, with some degree of uncertainty as to what the Court of Appeals wants. I am satisfied that their requirements should be fulfilled simply by a finding of the state of mind of the defendant at the time the various acts done were done, and I say that should fulfill the requirement. Whether in the opinion of the Court of Appeals it will fulfill the requirement is the question that causes me to suggest that possibly something short of a full finding might be made, a finding with relation to a portion of the facts. I suggest that in the same spirit that I lodged the proposed findings, and that is from an over-abundance of caution, feeling that the more that was found, the more likely it would be the Court of Appeals would be satisfied. But I personally feel that the simple finding as suggested by your Honor would fully satisfy the requirements of the Court of Appeals and is the finding that should be made, and I merely suggest to your Honor's judgment the possibility of adding some other matters to it; I don't urge [43] that upon your Honor at all.

Mr. Avakian: I think, your Honor, I am suffering under the same problem of not having found any authority which would indicate what specifically the Court of Appeals had in mind here, but it seems to me that the Court must have had in mind something more than a mere finding in the language of the statute because to me that would not be a special finding. That's a general finding of ultimate facts.

The Court: Let me interrupt you. I didn't mean a finding in the language of the statute. I meant a finding of the state of mind of the defendant. That is what they specifically asked for, I think. I don't think that would be a conclusion; that would be the verdict. In other words, if the Court only made a finding in the language of the statute, that would be a verdict or a decision one way or the other. But what I meant is that the Court should in response to this mandate of the Appellate Court, make a finding as to the state of mind. However, what have you to say about it?

Mr. Avakian: I am further handicapped, of course, because my belief is that there should be a finding, a judgment of not guilty in this case, and the findings to be made to support that conclusion do not present the same problem that would arise if the Court made the opposite conclusion, for obvious reasons. One of them being that there would be no appeal, and therefore, no review. [44]

The Court: In other words, if the Court came to the conclusion that the finding should be in this case that the defendant didn't have the requisite

state of mind, all that would be necessary would be a finding of not guilty.

Mr. Avakian: Well, as a practical matter, yes, because the question of just exactly what issues the Court of Appeals had in mind for findings would be rendered immaterial and unimportant.

In terms of what would conform with the Court of Appeals views as to findings in the event the Court should conclude that the judgment should be guilty, it seems to me that a finding that the defendant had the intent of intending to evade payment of the tax would in substance simply be a paraphrase of the statute, it would not set forth anything specific, and, accordingly, I would think that the Court of Appeals had in mind that if the Court should make findings to support a conclusion of guilty, that it should set forth in specific findings the conduct which constitutes the tax evasion conduct and that would be one of the constituent elements. In other words, the element of affirmative conduct would be found in special findings relating to the particular actions which constitute the affirmative conduct. And then the other constituent element of wilfulness would require a finding that these particular acts were done with the evil intent of attempting to evade tax. [45]

Unless it were done that way, it seems to me that it would not fit within the category of special findings as distinguished from a general finding of guilt.

I share your Honor's feeling that it really is impossible two years later to reappraise the details

of the evidence, and, as your Honor may know, we contended before the Court of Appeals that this type of remand that was made presented an impossible situation which was unfair both to the defendant and to the Court because we think it is unfair to the Judge also to ask the Judge to try to reappraise the evidence two years later. Certainly a judge would, through his training, be at less of a disadvantage than jurors would be if they were called back to reappraise it, but nevertheless, basically the same problem is there.

The Court: Was there any attempt to get any clarification of this from the Appellate Court at all?

Mr. Avakian: After the remand was made and the order modifying the original opinion, we filed a petition for rehearing, raising the question which I have just mentioned, and that petition was denied without further opinion or explanation.

The Court: As it is in the book, the terms of this remand were changed?

Mr. Avakian: The original opinion remanded the case for a new trial. [46]

The Court: Oh, yes. Yes, I recall now. Then there was a change.

Mr. Avakian: Then the Government filed a petition for rehearing, and the order which denied the Government's petition for rehearing modified the Opinion by substituting the last paragraph of the original Opinion and stating instead:

"The judgment of conversation is reversed. The case is remanded to the District Court for reconsideration in accordance with the principles set forth

in this Opinion, and for further findings by the trial court, after the Government has introduced evidence, if any, and the defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so."

So that that paragraph is substituted for the last paragraph in the original Opinion which remanded the case for a retrial.

The Court: So now we are here in accordance with that remand, either side having the right to introduce any further evidence, "* * * for reconsideration in accordance with the principles set forth in this Opinion, and for further findings by the trial court * * *"

Mr. Avakian: Yes. Incidentally, the opportunity for further evidence is presented to the Government with the opportunity to the defendant to answer any new evidence which the Government might produce.

The Court: And the Government chose not to produce any.

Mr. Avakian: That's right. Now, it seems to me, as I said a moment ago, that the Court of Appeals must have had in mind that the "further findings" that are mentioned here would set forth the particular acts or actions which are considered to be the tax evasion conduct to satisfy the special findings requirement as to one constituent element, and then a special finding as to whether those acts were done with or without the requisite evil intent. Unless it means that, it seems to me, that the special findings discussion would not be satisfied, and it seems to me that——

The Court: Of course, all they say, Mr. Avakian, in the Opinion, and all they talk about in the Opinion is the view of the Appellate Court as to the state of mind of the Court concerning the applicable law. They say the facts in the case would be sufficient if the proper principle of law were applied to warrant a conviction.

Mr. Avakian: The facts would be sufficient, they say, to support any one of three conclusions, a conclusion of felony, a conclusion of misdemeanor, or a conclusion of innocence.

The Court: That's right.

Mr. Avakian: That's right.

The Court: Which puts the Court in a very [48] embarrassing position because I think the Appellate Court is clearly wrong in its psychoanalysis of my state of mind. But I don't know what to do about it. It would be much better if they just left it, if they weren't satisfied with the decision, to send it back for a retrial or just reverse it, because, I say here very frankly to you, as I mentioned a moment ago, that not only am I bound by the opinion of the Court of Appeals as to the law applicable, but it is my own view of the state of the law, and it is the view of the law that I had at the time. It is very difficult for me, very embarrassing, to take that position, and it may be that I may have to write some sort of memorandum in the case; otherwise, I find myself in a very uncertain state of mind as to what the Appellate Court wanted done, and when it involves the liberty of a person under a criminal statute,

that's not a very satisfactory mental state for a judge to be in. I would do the best I can with it under the circumstances. I think that this perhaps should have been clarified more so that what the judge should do is more clearly stated. It is the duty of the trial court to follow what the Appellate Court says. That's what I would want to do. But I can't find the defendant guilty or not guilty because the Appellate Court tells me I should find him guilty or not guilty. They can reverse the judgment but there is no power on earth, nor in the law for one judge to tell another judge how he should find on something. After he makes a decision, he can say it [49] is a wrong decision and reverse it, or he can require that a certain action be taken, such as some ministerial or other act or direction that some act be done. But I don't think there is any under our system of law that an appellate or any other judge can tell another judge how he should find, because that is his function in the first instance, but he can say that is a wrong finding or reverse it.

Of course, it is part of our procedure for thwarting error, by the appellate process. I don't know what it is precisely, what sort of a finding, the appellate court is asking me to make.

Mr. Schnacke: Possibly this might clarify it, if your Honor please. As Mr. Avakian pointed out, the original decision of the Court of Appeals was that the case should be reversed and remanded for a new trial. Following that, the United States petitioned for a rehearing and suggested a rehearing en banc. That petition for rehearing was based, first, upon

the proposition that the judgment of conviction was based upon the proper subjective standard of wilfulness and that the Appellate Court had misconstrued and misinterpreted the standard employed by your Honor in deciding the case.

And then, as an alternative, we suggested that: "If the opinion of the Appellate Court is not reversed, the proper remedy is not remand for a new trial but for special findings pursuant to Rule 23, Federal Rules of Criminal Procedure." [50]

There are only two paragraphs and possibly it might be of assistance if I read those to your Honor:

"Assuming, arguendo, that this Honorable Court denies the rehearing hereinbefore petitioned and adheres to its present opinion, appellee requests in the alternative that the case be remanded to the District Court for special findings pursuant to Rule 23 of the Federal Rules of Criminal Procedure rather than for a new trial. As the Court's opinion points out, appellant made no formal request for findings pursuant to Rule 23 (citing case). Accordingly, the appellant did not properly preserve the question of law for purposes of appeal. We recognize that findings may, of course, be made even in the absence of any request (citing a case).

"The trial of this case consumed nine days and resulted in 973 pages of the printed record and voluminous accounting exhibits. To require retrial solely for the purpose of affording the trial court an opportunity to reappraise the evidence in the light of the standard of law as enunciated in this Court's opinion would entail unnecessary expendi-

ture of time and money. There being no other error, it is manifest that the trial court having the record before it could readily make such special findings under Rule 23 as may [51] be necessary to clarify the factual basis upon which he determined the existence of appellant's specific wilful intent to evade payment of the withheld taxes." Now, that language appears to be, to a certain extent, adopted in the Opinion when they say: "The case is remanded to the District Court for reconsideration in accordance with the principles set forth in this Opinion."

In reading that sentence, which is on page 326, again I am not overly clear on what they are saying. They say: "The case is remanded to the District Court for reconsideration" and then, after a comma, they go on to say, "and for further findings by the trial court, after the Government has introduced evidence, if any * * *"

Now, it may very well be that the findings that are there referred to are intended only in the event that there should be new evidence, but I am inclined to think, in the light of the request that was made by the United States, that it be remanded for special findings, that it was the contemplation of the Court that the special findings should be made whether or not new evidence was introduced. But the Court of Appeals, I think, has suggested a reconsideration——

The Court: I think that this Court is duty-bound to reconsider the decision in the light of what the Court of Appeals has said.

Mr. Schnacke: And I suppose that would be

true [52] even though there was, as your Honor has pointed out, nothing novel.

The Court: I think that this Court is duty-bound to reconsider—under this mandate it is duty-bound to reconsider in the light of everything that the Appellate Court said—it may be that it is not necessary to make any finding one way or the other—that the Court reconsider the case in the light of what is expressed by the Appellate Court and make a new determination of it, giving its reasons for it. It may be that it is not necessary to have findings.

Now, that is not my opinion, again so we don't get into any trouble unstairs, but I am just wondering if on a reconsideration of the case the Court could, in the light of what is said by the Appellate Court, redecide the case, maybe without having any findings as such, but giving the reasons for its decision one way or the other.

What do you think of that, Mr. Avakian?

Mr. Avakian: Well, considering the language of the revised paragraph in the light of the language from the Government petition for rehearing which Mr. Schnacke just read, it would appear to me that the Court did have in mind special findings based on a reappraisal of the evidence.

The Court: Yes, I realize that, but unfortunately we all don't have the same experience in the trial of cases. I say "we all"—all judges don't. What is meant by special [53] findings is some finding that is specially required and requested. It isn't that the judge just generally makes all kinds of findings in

a criminal case, just like it does in a civil case, and then only, really in 95% of the cases, on the proposals of the party who has prevailed in the case, with amendments suggested by the other side. I don't think the Appellate Court—I am not sure, but I don't think they meant that—maybe they did, I don't know—that upon this hearing each side should be given an opportunity to specially request certain findings.

Mr. Schnacke: Well, generally speaking, special findings, I think, would refer to specific questions that are asked of the trier of the fact: Is the fact so and so? Now, it seems to me that a reading of the Opinion of the Court of Appeals makes clear what the question is that is being asked of your Honor. The question is—these actions which the Court of Appeals concedes are sufficient if done with the proper intent to support the finding of guilty; these acts were performed by the defendant—were they performed with a state of mind, with the intent to defeat and evade the payment of the taxes? It seems to me that that is the only question that could conceivably be asked by this Opinion.

Obviously, the defendant does not ask for special findings. The Court of Appeals has, and a reading of the entire decision shows that that is the specific question they [54] are asking: Were the acts done with the requisite intent? And I would assume that your Honor can make a finding one way or the other with respect to that question without going anywhere beyond. At one point of the Opinion, for example, they say: "Was the diversion of funds—"

Well, it is true it is only one of the acts, but, at least, it is an act which they recognized as sufficient to be the act of evasion——

The Court: However, though, Mr. Schnacke, they do say, and I am reading from 325:

"The evidence adduced in the instant case is such that a verdict following any of the foregoing alternatives, if properly found, would be sustained."

And one of them was that the defendant so acted in part to evade or defeat the payment of taxes.

It may well be that all they want is the finding that the defendant acted, with respect to the matters charged in the indictment, to evade or defeat the payment of the taxes. They want the Court to say that.

Mr. Schnacke: In view of the fact that the only uncertainty appears to have been the state of your Honor's mind rather than the state of the defendant's mind in this case, it would seem to me that a clarification of your Honor's—that there is one of two things that could be done: One would be for your Honor to say: This is what I intended all the time, I am fully aware of the law; the other would be to say: I was [55] unaware of the law; I now see the law in a different light, and seeing it in that light, I reconsider.

I would think that the state of your Honor's mind would determine whether there should be an overall reconsideration of all of the problems in the case which would result if your Honor had misconceived the law in the first place, or if there had been no misconception, then it would seem foolish for there

to be a reconsideration of matters that your Honor has already considered.

The Court: I said to Mr. Avakian in that connection, looking back at the case two years ago, that I can only say now that I would not have found the defendant guilty of the charges contained in this indictment unless I were convinced beyond a reasonable doubt that what he did was a wilful attempt to evade the payment of these taxes. I mean, looking back, I don't think I would have found him guilty unless I was certain in my own mind that that was so. I think I so stated at the time of imposition of judgment, although the Appellate Court seems to have somewhat of a different viewpoint about it.

But now I think the problem is maybe, Mr. Avakian, somewhat the way Mr. Schnacke presents it, that I reconsider the case either saying that I always did have this point of view and I disagree with my appellate brethren in their analysis of my view of it, or that applying the law now as laid down by the Appellate Court, my decision is such and such. Maybe those [56] are the only two things that I can do.

It is a very troublesome, and I can say with far more positiveness than the Appellate Court said because I have been sitting in the trial court for 16 years, this is the most unique matter that has ever been presented to me and its uniqueness is occasioned by the manner in which the mandate of the Appellate Court is couched in a criminal case. I have never heard of anything like this before. I don't know of any other trial judge that has had

this experience. But there it is, and it is certainly very unique, and it is very disturbing, and it is very difficult when a man's liberty is at stake to have to engage in these kinds of niceties and technicalities in endeavoring to follow the reasoning of some other judge in the matter, who didn't hear the evidence and didn't see the case and didn't see the witnesses and so forth.

However, I will be glad to hear anything further that you want to present, Mr. Avakian, or Mr. Schnacke wants to present, either orally or in writing or in any way you want to present it.

Do you have any further ideas in the matter?

Mr. Avakian: I was just going to suggest, in somewhat light vein, perhaps we would be better off if the Government had not filed its petition for rehearing and left the original Opinion.

The Court: That might have been. It's hard to say. [57] As far as I am concerned, it would be much easier for me.

Mr. Schnacke: To look at it seriously, it has been the Government's point of view that there was never any doubt in your Honor's mind as to the law to be applied to this case. Now, in the light of that, it would have been nonsensical for this case to have been returned to be retried, and with only that one question to be determined.

The Court: Well, it would have been because of the fact that it was a court tried case. If it had been a jury case, it would have been very simple. If the judge gave the wrong instruction of the law to the jury, then it could have been returned for

retrial. But here the Appellate Court engaged in the unique enterprise of trying to analyze the lower court's state of mind after a finding of guilt. That is something particularly unique and presents a difficult problem.

You were going to say something else?

Mr. Avakian: I hope that your Honor and I know each other well enough so that I can say without embarrassment to either of us that I, of course, was of the view that the Court had been applying a rule of law different from that which the Court of Appeals announced and I am satisfied that the Government prosecutor was trying it on a different theory than the Court of Appeals announced. but that is behind us and we are in a situation now where we as attorneys have to accept as a premise the conclusions of the Court of Appeals which your Honor [58] has stated are contrary to your Honor's own views of what your state of mind was, and that makes it all the more difficult because we are in effect starting from a premise which your Honor finds it difficult to accept. But starting from that premise, if we start from that premise, that the incorrect principles of law were applied, then it seems to me that inevitably the Court of Appeals must have had in mind two things, one was a complete reappraisal of the evidence, with a fresh start of what the law is, and this is particularly so in a case where intent has to be inferred from circumstances, as it does here because of the significance of the circumstances which would give rise to one inference rather than another and depends on the ap-

proach of the trier of the fact as to what is important in the law in this conduct. So, I think that the Court of Appeals, having held that your Honor applied the wrong standard of law, must have had in mind that you would now make a fresh and new appraisal of the evidence, drawing such inferences as this new appraisal of the evidence would warrant in your mind in the light of the Court of Appeals' statement of the law.

As I said earlier, I find it difficult to contemplate that any human being, and I don't think I need to say specifically that I have a very high regard for your Honor's own ability in this regard, but still we are all human, and I don't think that any human being two years later can make this type of [59] fresh appraisal of evidence.

The second thing the Court of Appeals must have had in mind, then, by reason of the fact of this discussion of Rule 23 and of the Government's suggestion in its petition for rehearing that, if nothing else, the case be remanded for special findings under Rule 23, is that the Court would now make findings in the nature of special findings, whatever that might mean, which I would interpret to mean a setting forth of the specific acts and conduct which the Court considers the critical acts bearing on the question of tax evasion, coupled with a finding as to whether those acts were done with or without the requisite criminal intent.

Unless we have something of that kind, it seems to me that we would not be giving credence to the Government's request in its petition for rehearing

that the most that should be done would be a remand for special findings.

The Court: I will study it over some more, gentlemen. If you want to submit anything further, if you have any further ideas, in writing, why, I will be glad to hear whatever you have. If you think of anything in the next week or ten days, why, don't hesitate to send it in.

Certificate of Reporter

I (We), Official Reporter(s) and Official Reporter(s) pretem, certify that the foregoing transcript of 60 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting, to the best of my (our) ability.

/s/ [Indistinguishable]

[Endorsed]: Filed August 18, 1958. [60]

[Title of District Court and Cause.]

CRIMINAL DOCKET

1956

July 13—Trial Resumed, Evidence Introduced, Ord. Contd. to July 16th for further Trial.

July 16—Trial Resumed, Evidence Introduced, Ord. Contd. to July 17th for further Trial.

July 17—Trial Resumed, Evidence Introduced, Ord. Contd. to July 18th for further Trial.

1956

July 18—Trial Resumed, Evidence Introduced, Ord. Contd. to July 20th for Decision.

July 20—Trial Resumed, Evidence Introduced, Deft. Adjudged Guilty, as to all Cts. referred to Probation Officer, Ord. Contd. to Aug. 2nd for Hearing of Motions & Judgt.

July 23—Filed Receipt of Exhibits, U. S. Atty.

July 30—Filed Motion for a New Trial.

July 30—Filed Notice of Motion for a New Trial.

July 30—Filed Memorandum of Points & Authorities for New Trial.

July 30—Filed Affidavit of Spurgeon Avakian.

Aug. 2—Deft. Sentenced to Eighteen Months & Fine of $5,000.00 on Ct. 1—Eighteen Months on each of Cts. 2, 3, 4, 5, & 6 to run concurrently—Stay of Execution until Aug. 3, '56. Ord. Bail on Appeal $2,500.00.

Aug. 2—Filed Notice of Appeal.

Aug. 3—Filed Bail Bond on Appeal.

Aug. 3—Filed Order Permitting Deft. to Leave Jurisdiction.

Aug. 7—Filed Costs of Prosecution ($1,124.16).

Aug. 8—Entered Judgment & Commitment, filed 8/7/56.

Aug. 10—Filed Designation of Matter to Be Included in Record on Appeal.

Sept. 7—Filed Order Extending Time on Appeal —Oct. 15th.

1956

Sept.11—Filed Order for Motion to Withdraw Exhibits.

Sept.11—Filed Receipt of Exhibits.

Sept.21—Filed Receipt of Record on Appeal from Circuit Court.

1957

Nov. 4—Filed Order Permitting Defendant to Leave Jurisdiction.

1958

Jan. 22—Filed Order Permitting Defendant to Depart Jurisdiction.

Mar. 7—Filed Mandate, Ord. and Adjudged by the Court of Appeals, that the Judgment of said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for reconsideration in accordance with the principles set forth in the opinion of this Court, and for further findings by the Trial Court, after the government has introduced evidence, if any, and the Defendant has been given the right to respond to any new evidence produced by the Government, if he desires to do so.

(November 14, 1957)

(As Amended by Order Filed February 27, 1958)

June 11—Lodged Plaintiff's Proposed Special Findings of Fact and Conclusions of Law, Pursuant to the Order of the Ninth Circuit Court of Appeals.

1958

June 13—Filed Stipulation of U. S. Atty. to File Objections for Special Findings of Fact and Conclusions of Law.

June 23—Filed Stipulation for Deft. to File Objections to Special Findings and Conclusions of Law.

June 30—Filed Deft's. Objections to Plaintiff's Proposed Special Findings, etc.

July 18—Ord. Findings Submitted.

July 28—Ord. Deft. Adjudged Guilty as charged in Indictment, Aug. 1st for Judgt.

July 28—Filed Opinion, Findings and Decision.

July 29—Ord. Contd. to Aug. 8th for Judgt.

Aug. 8—Ord. Deft. Sentenced to Eighteen (18) Months on Ct. 1 and Fined $5,000.00 on Ct. 1—and Sentenced to Eighteen months on each of cts. 2, 3, 4, 5, 6 to run concurrently with Ct. 1. Stay of Execution until Aug. 11th.

Aug. 8—Filed Notice of Appeal.

Aug. 8—Filed Order Permitting Deft. to Depart from Jurisdiction.

Aug. 8—Entered Judgment and Commitment, filed 8/8/58.

Aug. 8—Order for Transfer of Funds on Bail Bond on Appeal.

Aug. 8—Filed Bail Bond on Appeal.

Aug. 15—Filed Designation of Matter to Be Included in Record of Appeal.

Aug. 18—Filed Reporter's Transcript, dtd. July 18, 1958.

Aug. 21—Filed Unexc. Commitment. 1st Trial.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Plaintiff's proposed special findings of fact and conclusions of law pursuant to order of the United States Court of Appeals for the Ninth Circuit, dated February 27, 1958.

Defendant's objections to Plaintiff's proposed special findings of fact and conclusions of law, etc.

Opinion, findings of fact and decision.

Judgment and Commitment.

Notice of Appeal.

Designation of matter to be included in record on appeal.

Photographic copy of the docket entries subsequent to the former appeal.

Transcript of proceeding of July 18, 1958.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said District Court this 15th day of September, 1958.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ J. P. WALSH,
Deputy Clerk.

[Endorsed]: No. 16184. United States Court of Appeals for the Ninth Circuit. Arthur King Wilson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: September 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16184

ARTHUR KING WILSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant states that the points on which he intends to rely on appeal are as follows:

(1) The evidence is insufficient to support the finding of guilt as to any of the six counts in the indictment.

(2) The evidence is insufficient to show any affirmative conduct by appellant directed toward, or constituting, a wilful attempt to evade payment of any of the taxes in question.

(3) The Court committed error in denying appellant's motion for acquittal at the close of appellee's case, and also at the close of all the evidence.

(4) The Court committed error in sustaining the objection to appellant's offer to prove that, prior to the indictment, he had given appellee security for payment of the taxes in question, and that he had thereafter actually paid said taxes.

(5) The Court committed error in finding appellant guilty, in view of the Court's frank acknowledgment that it would be impossible to make a new

determination of the guilt or innocence of the defendant on the basis of evidence heard and received two years earlier.

(6) The Court committed error in failing to accept the decision of the Court of Appeals that the trial court had previously held an erroneous view of the law, and in again finding appellant guilty on the basis of the same view of the law as the trial court had at the time of the first judgment.

(7) The Court committed error in undertaking to determine the guilt or innocence of appellant on the basis of the former record two years after hearing the testimony and after having originally found appellant guilty on an erroneous theory of law.

Dated this 19th day of September, 1958.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed September 19, 1958.

[Title of Court of Appeals and Cause.]

No. 16184

STIPULATION REGARDING USE OF EXHIBITS

Appellant having previously designated for printing Government's Exhibits 1, 2, 3, 4, 5, 6, 33, 35, 44,

45, 49, 50, 51, and 52; and Defendant's Exhibits F, G, H, I, J, K, and L, and said exhibits having been printed in connection with the former appeal in this matter; and

It appearing that the remainder of the exhibits introduced in evidence at the trial are of such a nature that the printing thereof would involve great expense and considerable time,

It Is Hereby Stipulated, by and between appellant and appellee, that each and all of the exhibits not designated to be printed may be used and considered as part of the record herein on appeal in their original form.

Dated this 15th day of August, 1958.

ROBERT H. SCHNACKE,
United States Attorney;

/s/ ROBERT H. SCHNACKE,
For Appellee.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

[Endorsed]: Filed September 19, 1958.

[Title of District Court and Cause.]

STIPULATION AND ORDER

In order to avoid unnecessary printing expense, it is hereby stipulated, subject to the order of the

Court, that the record printed in connection with the prior appeal (bearing Docket No. 15,301) in the above-entitled matter may be considered a part of the record on appeal herein without being reprinted; that all petitions for rehearing and answers thereto filed in the Court of Appeals after the original decision on such prior appeal may likewise be considered a part of the record on appeal herein without being printed; and that the parties may refer to, and the Court may take notice of, all matters to which this stipulation relates as if the same had been printed as a part of the record on this appeal.

Dated this 24th day of September, 1958.

SPURGEON AVAKIAN,
J. RICHARD JOHNSTON,
H. HELMUT LORING,

By /s/ SPURGEON AVAKIAN,
Attorneys for Appellant.

ROBERT H. SCHNACKE,
United States Attorney;

By /s/ ROBERT H. SCHNACKE,
Attorney for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Circuit Judge;

/s/ WALTER L. POPE,
Circuit Judge;

/s/ STANLEY N. BARNES,
Circuit Judge.

[Endorsed]: Filed October 2, 1958.